

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF LOUISIANA

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COPY

3  
4 DIANNE CASTANO, ERNEST PERRY, \* CIVIL ACTION  
and GEORGE SOLOMON, ON \*  
5 BEHALF OF THEMSELVES AND ALL \* NO. 94-1044  
6 OTHERS SIMILARLY SITUATED, \* SECTION "B"  
Plaintiffs, \*  
7

8 VERSUS \* MAG. 5  
9

10 THE AMERICAN TOBACCO COMPANY, \*  
INC.; AMERICAN BRANDS, INC.; \*  
11 R. J. REYNOLDS TOBACCO \*  
COMPANY; RJR NABISCO, INC.; \*  
12 BROWN & WILLIAMSON TOBACCO \*  
CORPORATION; BATUS, INC.; \*  
13 BATUS HOLDINGS, INC.; PHILIP \*  
MORRIS, INC.; PHILIP MORRIS \*  
14 COMPANIES, INC.; LIGGETT \*  
& MYERS, INC.; LIGGETT GROUP, \*  
15 LTD.; LORILLARD TOBACCO \*  
COMPANY, INC.; LORILLARD, \*  
16 INC.; LOWES CORPORATION; \*  
UNITED STATES TOBACCO \*  
COMPANY; UST, INC.; AND, \*  
TOBACCO INSTITUTE, INC., \*  
Defendants. \*

17 \* \* \* \* \*

18  
19  
20 Deposition of EDWARD F. SHERMAN,  
J.D., [DELETED]  
21 , taken in the Law Offices of Jones,  
Day, Reavis and Pogue, Sixth Floor,  
22 Metropolitan Square, 1450 G Street, N.W.,  
Washington, D.C. 20005-2088, commencing at  
23 9:32 o'clock a.m., on Monday, the 29th day  
of August, 1994.

Main PI File Room

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REPORTER'S NOTE:

"Exhibit Number 3" and "Exhibit Number 5"  
not attached

"Exhibit Number 4" on file at Huffman and  
Robinson Court Reporters



S T I P U L A T I O N

It is stipulated and agreed by and among counsel for the parties hereto that the deposition of the aforementioned witness is hereby being taken under the Federal Rules of Civil Procedure, for all purposes, in accordance with law;

That the formalities of reading and signing are specifically not waived;

That the formalities of filing, sealing, and certification are specifically waived;

That all objections, save those as to the form of the question and the responsiveness of the answer, are hereby reserved until such time as this deposition, or any part thereof, may be used or sought to be used in evidence.

\* \* \* \*

CHERYL FOURNET HUFFMAN, Certified Court Reporter, in and for the Parish of Orleans, State of Louisiana, officiated in administering the oath to the witness.

P R O C E E D I N G S

MR. BROWN:

My name is Raymond R. Brown. I'll be operating the video equipment for this deposition. My address is [DELETED]

I'm self-employed.

This deposition is being taken pursuant to notice in the case titled "Dianne Castano, et al versus The American Tobacco Company, et al," being heard in the U. S. District Court for the Eastern District of Louisiana. The witness this morning is Edward Sherman, Ph.D.

Today is the 29th of August, 1994. We're at the offices of Jones, Day, Reavis and Pogue in Washington, D.C. The time as indicated electronically on the lower portion of the television screen is currently 9:32:46. At this time counsel will identify themselves indicating the parties they represent. The court reporter will then identify herself, administer the oath to the witness.

MR. McDERMOTT:

1 Robert McDermott of Jones, Day,  
2 Reavis and Pogue representing R. J. Reynolds  
3 Tobacco Company.

4 MR. DELACROIX:

5 Scott Delacroix of Adams and Reese  
6 representing Philip Morris.

7 MR. WILSON:

8 James Wilson of Shook, Hardy and  
9 Bacon also representing Philip Morris.

10 MR. SCHAEVITZ:

11 Barry Schaevitz, Jacob, Medinger  
12 and Finnegan, United States Tobacco.

13 MR. VOLLINS:

14 Steven Vollins, Chadbourne and  
15 Parke, representing The American Tobacco  
16 Company.

17 MS. HINES:

18 Laura Hines of Arnold and Porter  
19 representing Philip Morris.

20 MR. BRUNO:

\*21 Joseph Bruno with the plaintiffs.

22 MR. EBLE:

23 Tim Eble of Ness, Motley,  
24 Loadholt, Richardson and Poole for the  
25 plaintiffs.

1 MR. SAVERI:

2 Joseph Saveri with Lieff, Cabraser  
3 and Heilmann for the plaintiffs.

4 MR. McDERMOTT:

5 Bob, why don't you identify  
6 yourself.

7 MR. KLONOFF:

8 Robert Klonoff, counsel for R. J.  
9 Reynolds Tobacco Company.

10 THE COURT REPORTER:

11 Cheryl Huffman with Huffman and  
12 Robinson Court Reporters in New Orleans.

13 EDWARD F. SHERMAN, J.D.,  
14 after having been first duly sworn by the  
15 above-mentioned Certified Court Reporter,  
16 did testify as follows:

17 EXAMINATION BY MR. McDERMOTT:

18 Q. Please state your name.

19 A. Edward F. Sherman.

20 Q. What's your address?

21 A. [DELETED]

22

23 Q. Professor Sherman, can you give us  
24 a quick summary of your educational  
25 background?

1           A.       After graduating from public high  
2 schools in El Paso, Texas, I attended  
3 college at Georgetown University, graduating  
4 with an A.B. degree. I attended and  
5 graduated from Harvard Law School with a  
6 J.D. degree and I have master's degrees from  
7 the University of Texas in English and  
8 Government.

9           Q.       Could you give us a brief summary  
10 of your job history after graduating from  
11 law school?

12          A.       After graduating from law school,  
13 I clerked as a clerk for a federal judge in  
14 the Western District of Texas and then  
15 joined a law firm in El Paso, Texas doing  
16 general litigation and general practice. I  
17 then served two years in the U. S. Army in  
18 the -- in legal positions.

19                   And then came to Harvard Law  
20 School for two years as a teaching fellow,  
21 then for eight years I taught at the  
22 University of Indiana School of Law. And  
23 since 1977, I've been at the University of  
24 Texas School of Law.

25          Q.       What position do you currently

1 hold at the University of Texas?

2 A. I'm the Edward Clark Centennial  
3 Professor of Law.

4 Q. Is that an honorary appointment or  
5 a particularly distinctive appointment?

6 A. It's one of the endowed  
7 professorships that is -- of which there are  
8 a relatively small number.

9 Q. What subjects do you currently  
10 teach?

11 A. I regularly teach federal civil  
12 procedure, complex litigation, alternative  
13 dispute resolution, or some aspect of that  
14 such as arbitration, and sometimes teach  
15 courses in other litigation courses or  
16 constitutional law courses.

17 Q. Does your civil procedure course  
18 deal with class actions?

19 A. Yes, it does.

20 Q. And what subjects does your  
21 complex litigation course cover?

22 A. It covers the structure of a  
23 lawsuit, particularly looking at multi-party  
24 complex cases, and it considers the whole  
25 range of aggregative techniques going from

1 joinder to consolidation to multi-district  
2 consolidation to class actions. And then it  
3 deals with various management problems of  
4 complex litigation, including the judicial  
5 administration of complex cases and,  
6 finally, res judicata.

7 Q. How long have you been teaching  
8 complex litigation?

9 A. Well, I started teaching complex  
10 litigation in the early 1980s. It was a  
11 course that I created myself because I felt  
12 a need for an advanced federal civil  
13 procedure course and, previously, advanced  
14 civil procedure courses had often focused on  
15 relatively narrow areas such as remedies.

16 And I felt that there was an  
17 emerging new subject matter in civil  
18 procedure called complex litigation. And  
19 that, although many of the principles arose  
20 from civil procedure, that there was  
21 something distinctive about complex  
22 litigation. So I started teaching this  
23 course in the early eighties, putting  
24 together my own materials for it.

25 Q. Were you something of a pioneer in

1 this field?

2 A. Yes, I was one of the first  
3 people. There was another -- There were  
4 several other law school professors who were  
5 toying with some of the same ideas. One of  
6 them was Richard Marcus who became my  
7 co-author in the casebook that we published  
8 in 1985. He was also teaching a similar  
9 course with some of the aspects of complex  
10 litigation that he had experienced in his  
11 practice.

12 And we were brought together by  
13 West Publishing Company. And we then  
14 published this casebook in 1985 which has  
15 now -- which has resulted in complex  
16 litigation courses being offered in law  
17 schools around the country.

18 Q. Before we get to your textbooks,  
19 let me ask you a little bit about your  
20 alternate dispute resolution course. Does  
21 that subject touch upon or have any  
22 relevance to mass tort litigation?

23 A. Yes, it does. I'm also a  
24 co-author of an alternative dispute  
25 resolution casebook. And one of the



1 chapters deals with mass torts and complex  
2 cases. Because alternative dispute  
3 resolution has also been turned to in  
4 certain kinds of complex cases and mass  
5 torts and class actions in an attempt to  
6 resolve these very difficult problems.

7 Q. Have you written any textbooks in  
8 the field of civil procedure?

9 A. I'm the co-author of a basic  
10 first-year federal civil procedure casebook.

11 Q. How widely is it used?

12 A. It's used around the country. I  
13 think we're the second -- in second place in  
14 terms of the basic civil procedure text  
15 around the country in terms of usage.

16 Q. You mentioned that -- You've  
17 already mentioned your complex litigation  
18 casebook. How widely is that used?

19 A. It's widely used. I don't know  
20 how many law schools offer courses in  
21 complex litigation, but quite a number do  
22 today. And it's the only casebook in the  
23 field, so it gets used.

24 Q. It's both in first and last place,  
25 huh?

1 A. Yes.

2 Q. And you indicated you have a  
3 casebook on alternative dispute resolution.  
4 Is that widely used as well?

5 A. Yes, it is.

6 Q. Have you written, in addition to  
7 your casebooks, articles in the field of  
8 complex litigation and alternative dispute  
9 resolution?

10 A. Yes, I have.

11 Q. Can you tell us about any  
12 particularly significant articles you've  
13 written that bear on your testimony today?

14 A. I guess I've -- I'd point to three  
15 major articles that deal with the field of  
16 complex litigation. One was an article in  
17 1984 published in the Texas Law Review which  
18 was a, what I call, a book review essay.

19 I was reviewing two very important  
20 recent books on complex litigation, one by  
21 Judge William Schwarzer, which reviewed his  
22 practical suggestions for handling of  
23 complex litigation; and one by Professor  
24 Jeffrey Hazard and a magistrate, federal  
25 magistrate in California, also dealing with

1 the practicalities of complex litigation.

2 And I used this to -- these two  
3 books to write a larger article talking  
4 about the developments in complex litigation  
5 and the kinds of problems that I saw  
6 developing.

7 Then in 19, I think it was 1987 --

8 Q. This article was published in  
9 1984?

10 A. That's right.

11 Q. And then you put together your own  
12 casebook or textbook in 1985 following that?

13 A. And then our casebook was  
14 published in 1985.

15 Q. All right.

16 A. Then in '87 I was asked to join a  
17 symposium on class actions in the Indiana  
18 Law Review. And I -- my article is on class  
19 actions in duplicative litigation,  
20 particularly focusing on the role of class  
21 actions in attempting to avoid the problem  
22 of duplicative litigation and the kinds of  
23 problems that arise in that context.

24 And then in, I believe it was  
25 1991, I published an article in the Review

1     of Litigation, also a symposium issue. This  
2     arose out of a talk I had given at the  
3     annual meeting of the American Association  
4     of Law Schools. And this was particularly a  
5     policy piece. It focused on the policies,  
6     both pro and con, of using aggregative  
7     techniques for dealing with litigation that  
8     involved similar claims by large numbers of  
9     people.

10           Q.     I think you have before you  
11     "Exhibit 1," which is a copy of your  
12     curriculum vitae. I don't want to go over  
13     all of your various publications and so  
14     forth, but does that provide a pretty  
15     complete and up-to-date summary of your  
16     professional writings in this and other  
17     fields?

18           A.     Yes, it does.

19           Q.     And it provides a little bit more  
20     detail on your job history and other  
21     professional activities?

22           A.     Yes.

23           Q.     Let me ask you about some of your  
24     other professional activities. In  
25     particular, let me direct your attention to

1 the ALI Complex Litigation Project which is  
2 described on your C.V. at Page 2, I  
3 believe. Can you tell us what your  
4 participation in that entails?

5 A. Well, I was elected to the  
6 American Law Institute in 1989. And at that  
7 time I became a member of the consultative  
8 group for the Complex Litigation Project,  
9 which had been going on for a brief period  
10 prior to that.

11 The consultative group are a group  
12 of ALI members, judges, practicing attorneys  
13 and law school professors who have special  
14 expertise or interest in a particular  
15 project. And I was an active member of that  
16 consultative group.

17 The consultative group meets with  
18 the reporters for the project for an all-day  
19 session at various times. The reporters  
20 send out drafts, send it around to the  
21 consultative members, and comments are sent  
22 back, and then we meet in these meetings.

23 And I attended a number of these  
24 meetings which resulted in a final  
25 presentation of the report to the ALI, which

1 was voted on and passed, I think it was, in  
2 1993.

3 Q. Can you tell us generally what  
4 kinds of changes, if any, this group was  
5 recommending?

6 A. Well, this report did not deal  
7 directly with class actions. It dealt with  
8 the problem of duplicative litigation and  
9 particularly with the barriers to  
10 aggregation that are imposed by federal  
11 jurisdictional problems and venue problems,  
12 limitations on the ability to transfer cases  
13 under the multi-district panel and matters  
14 of consolidation.

15 So it dealt with attempts to  
16 remove some of the artificial barriers,  
17 particularly the jurisdictional barriers,  
18 that prevent cases from being aggregated.

19 Q. Let me ask you about your activity  
20 as reporter for the project on -- what is  
21 it? -- delay and cost reduction strategies?

22 A. Well, the ABA last year under the  
23 leadership of ABA President Bill Ide  
24 undertook an initiative to study the civil  
25 justice system and to make proposals that

1 would address some of the dissatisfactions  
2 around the country with civil justice.

3 And they had three working  
4 groups. The working groups were composed of  
5 citizens of lawyers as well as lay persons.  
6 And I was the reporter for one of these  
7 working groups.

8 And we made a report at a  
9 conference held in Washington, D.C. in May,  
10 proposing a variety of matters having to do  
11 with improved judicial administration, case  
12 management, incentives to settlement,  
13 broader use of alternatives to litigation  
14 and so forth.

15 Q. Your affidavit, "Exhibit 2," lists  
16 an activity that I'd like you to expand on  
17 briefly. It indicates that you're the chair  
18 of a Complex Litigation Committee of the  
19 American Association of Law Schools, Civil  
20 Procedure Section. Can you tell us what  
21 that activity entails?

22 A. When complex litigation became a  
23 distinctive legal specialty, the American  
24 Association of Law Schools, Civil Procedure  
25 Section, decided that there ought to be a

1 separate committee within that section that  
2 dealt with it.

3 And the purpose of that Complex  
4 Litigation Committee that I headed at that  
5 time, I'm not head of it now, was to put on  
6 programs primarily at the annual meeting and  
7 to keep the people who teach complex  
8 litigation informed of developments through  
9 a newsletter and to foster the development  
10 of the academic side of complex litigation.

11 Q. So this was a group of experts or  
12 scholars dealing in the field of civil  
13 procedure and a subgroup of people who  
14 specialized in complex litigation problems?

15 A. That's right.

16 Q. And was this chair an elected  
17 post?

18 A. Yes, it was elected by the group.

19 Q. In addition to the formal  
20 activities dealing with complex litigation,  
21 some of which you described and others which  
22 are set out in your C.V., do you engage in  
23 informal activities and discussions  
24 regarding complex litigation and class  
25 actions with colleagues in the Bar?



1           A.       Yes, I do. Because we have this  
2 complex litigation casebook with my  
3 co-author, Rick Marcus of Hastings College  
4 of Law, every summer before the fall  
5 semester we put out an update. And so we  
6 try to keep up on what's going on. And  
7 we're not able to keep up with everything  
8 but we try to keep our eye on published  
9 cases.

10                   If there is a certain litigation  
11 going on, we try to follow it insofar as  
12 it's written about in legal journals. We  
13 sometimes get pleadings and briefs from  
14 counsel. We have telephone conversations  
15 with counsel and sometimes judges and  
16 sometimes other law professors in order to  
17 try to keep ourselves up-to-date.

18           Q.       In addition to being a scholar,  
19 have you served as counsel in any class  
20 action litigation?

21           A.       Yes, I have.

22           Q.       Can you give us a brief summary of  
23 your experience as counsel of record in  
24 class action litigation?

25           A.       Well, as a federal judge law

1 clerk, of course, I dealt with the class  
2 actions that were before the Court and had  
3 familiarity with the practice as it existed  
4 at that time. After that in my private  
5 practice and then the practice that I've  
6 carried on since I've become a law  
7 professor, I've taken on a number of cases  
8 in which I'm counsel or co-counsel in class  
9 actions.

10 In the early part of my academic  
11 career, starting in 1967 and into the  
12 seventies, most of the class actions that I  
13 did were taken on pro bono for Legal  
14 Services or Legal Aid or the Civil Liberties  
15 Union. And most of the class actions that I  
16 was counsel in were -- involved civil  
17 rights, military service members' rights,  
18 certain kinds of consumer class actions and  
19 finally prison litigation, prisoners' rights  
20 litigation.

21 Q. Have you handled any securities  
22 fraud cases?

23 A. Yes. And then since that time  
24 I've also been co-counsel in a large  
25 consolidated securities fraud, RICO, common

1 law fraud case. And I guess that's kind of  
2 the breadth of the cases in which I've  
3 served as co-counsel.

4 Q. Have you appeared on the  
5 plaintiffs' side predominantly or the  
6 defendants' side or about equal? What --

7 A. In all of those cases that I was  
8 just mentioning, I was on the plaintiffs'  
9 side.

10 Q. In addition to being counsel of  
11 record or co-counsel, have you also served  
12 as an expert consultant in some class action  
13 litigation?

14 A. Yes, I've served as a consultant,  
15 both paid and unpaid, to lawyers who call me  
16 and sometimes to judges who call me about  
17 particular problems that they have in some  
18 piece of complex litigation or class  
19 action. I've consulted on a number of  
20 securities fraud, insurance fraud, real  
21 estate fraud and misrepresentations,  
22 consumer class actions, mass torts, personal  
23 injury litigation.

24 Q. Now, Professor Sherman, is it fair  
25 to say that you spent the majority or a

1 major portion of your professional life  
2 working, teaching, writing and thinking  
3 about complex litigation problems, including  
4 class actions and alternative devices and  
5 techniques for addressing complex litigation  
6 problems?

7 A. Certainly since the early eighties  
8 when I began this particular focus with  
9 complex litigation, that's been, I suppose,  
10 the principal thrust of my academic research  
11 and writing and my practice, and my outside  
12 practice as well.

13 Q. Let me talk to you a little bit  
14 about your testimony here today. When were  
15 you retained?

16 A. Early in the summer I was called  
17 by Bob Klonoff concerning this case.

18 Q. What were you asked to do?

19 A. I was asked to consider a pending  
20 motion for certification of a class action  
21 in this case and to consider the propriety  
22 of certification and what problems the class  
23 action might give rise to.

24 Q. How did you respond?

25 A. I said that I would have to read

1 the pleadings and any other documents and do  
2 some study and some research and I'd, after  
3 that, be able to have some notion of a  
4 reasoned judgment on it.

5 Q. What did you, in fact, do?

6 A. The pleading -- A number of things  
7 were sent to me, some of the pleadings, some  
8 of the memoranda of law concerning the  
9 issues, some background on tobacco  
10 litigation from articles, some Law Review  
11 articles. I did some research of my own in  
12 Class Action Reporter and some other  
13 sources. And on the basis of this, I was  
14 able to provide some indication of my own  
15 thoughts and insights about this proposal.

16 Q. Could you give us a brief summary  
17 of your thoughts and insights which you came  
18 to as a result of your review?

19 A. Well, I came to the conclusion  
20 that this is a quite extraordinary class  
21 action. It's unprecedented in scope of all  
22 the class actions I've ever encountered.  
23 And I think it poses some very serious  
24 manageability problems, both because of  
25 problems of class definition and because of

1 the absence of the predominance of common  
2 issues.

3 And when one considers whether  
4 this particularly cumbersome class action as  
5 proposed is superior to other means of  
6 resolving the litigation that's involved, I  
7 think it probably is not superior.

8 Q. Are the views and concerns that  
9 you've summarized set forth in the affidavit  
10 which is "Exhibit 2" in front of you?

11 A. Yes, they are.

12 Q. All right. Let me ask you,  
13 Professor Sherman, since a question has been  
14 raised about this, is it your purpose to  
15 instruct the Court on how it should rule on  
16 the certification issue that's going to be  
17 presented to it?

18 A. No, certainly not. That's a  
19 matter for the discretion of the Court. All  
20 I could -- can bring to this is the fact  
21 that I've had some extensive practice  
22 experiences with complex litigation, that I  
23 focused on it in my academic role for a  
24 number of years. I've written, researched  
25 and thought about some of these issues.

1                   And I'd hope I would have some  
2                   insights that might be useful to a court in  
3                   making a decision about the propriety of  
4                   using class action under these situations --  
5                   in this situation.

6                   Q.       Well, are you going to interpret  
7                   the case law for the Court?

8                   A.       No, I'm not here to do that. The  
9                   lawyers and the Court are quite capable of  
10                  reading the cases and interpreting them. I  
11                  have my own -- I've read the cases, I have a  
12                  kind of a theoretical construct of my own as  
13                  to how to try to explain what the cases  
14                  are. But I'm relying very heavily on my own  
15                  personal experiences in these matters and  
16                  what I've read and thought about on the  
17                  academic side.

18                  Q.       Okay. Well, if you're not going  
19                  to tell the Court how to rule and you're not  
20                  going to interpret the case law, what is it  
21                  you think you can offer to the Court?

22                  A.       I would hope I have some useful  
23                  insights on the practical side of how a  
24                  class action might play itself out in this  
25                  case. I think there's some very serious

1 problems in using class action here. I  
2 would hope to raise whether they can be  
3 dealt with by some of the more common  
4 devices for getting around those kinds of  
5 problems. And based on my experience and  
6 thinking about it, maybe I'd have something  
7 that would be useful to consider.

8 Q. Let me turn to some of the  
9 problems which you have outlined in your  
10 affidavit. And let's start with class  
11 definition. Could you spend just a moment  
12 and explain the role of class definition in  
13 class litigation and why it's important to  
14 have a good class definition?

15 A. Well, it's important to have what  
16 courts call an adequate class definition at  
17 the beginning of the class action for a  
18 number of reasons. First, it's very  
19 difficult for a court to make a reasoned  
20 determination of the certifiability of the  
21 class on such matters as the -- as  
22 representativeness and typicality if you  
23 don't have criteria that will tell you, not  
24 by name, but by identifiable features who  
25 are members of the class.



1           Second, this is a (b)(3) class  
2           action. And in a (b)(3) class action, the  
3           class members have to be given notice and a  
4           right to opt out. And that's going to have  
5           to be done early in the litigation. In  
6           order to be able to know what that -- how  
7           that notice is going to go out and how it's  
8           going to be phrased in the public notices  
9           and so forth, and how you're going to inform  
10          the public as to whether they are members of  
11          the class so that they can make a reasoned  
12          judgment as to whether they want to opt out,  
13          it's going to have to -- you're going to  
14          have to have some class definition that  
15          helps you to identify who those people are.

16                 Then the class definition has  
17          something to do with structuring the whole  
18          piece of litigation. You need to know -- to  
19          be able to identify who the people are so  
20          you know what sort of discovery is going to  
21          take place, how the case ought to be divided  
22          up in terms of trials and so forth.

23                 And then, last, the class  
24          definition is important at the judgment  
25          stage in order to preserve the integrity of

1 the res judicata effect of a class action.  
2 The reason behind a class action is to set  
3 aside, once and for all, with finality, all  
4 the claims that the class members have  
5 against the defendants.

6 And the problem is if you have an  
7 insufficient class definition, a vague class  
8 definition, so that you really can't  
9 determine exactly who is in that class at  
10 that point, then you have an interesting  
11 phenomenon that the courts have called a  
12 fail-safe class.

13 If the defendants have won the  
14 case, then you're going to have class  
15 members who will disavow their membership,  
16 claiming that they -- that the definition  
17 was vague and they really weren't members of  
18 the class and, therefore, they're not bound  
19 by that judgment.

20 On the other hand, if the  
21 plaintiffs win, you're going to have people  
22 coming in out of the woodwork claiming that  
23 they, in fact, were members of the class  
24 and, therefore, are entitled to the recovery  
25 or other relief accorded by the class

1 action.

2 Not only is this unfair to the  
3 defendants but it undercuts the kind of  
4 preclusive effect that a class action is  
5 supposed to have.

6 Q. Well, do you need to know  
7 precisely who is in the class before you  
8 embark on class action litigation? Do you  
9 need a list of plaintiffs, for example?

10 A. Oh, no, there's no necessity that  
11 you be able to name the plaintiffs in  
12 advance. That can be done at a later  
13 stage. But you have to have some objective  
14 criteria by which you can identify the  
15 people who fall within the class.

16 Q. Why can't a final decision on such  
17 matters be postponed for a little while?  
18 Why, you know -- When does this decision  
19 need to be made?

20 A. Well, deciding to certify a class  
21 is a fairly momentous decision for a court,  
22 particularly momentous in a class action of  
23 the scope of this one. But even a small  
24 class action is quite a step. It means that  
25 you are undertaking a cumbersome, complex

1 and often expensive process.

2 The whole right to notice and opt  
3 out means that right up front there will be  
4 up-front costs of considerable magnitude.  
5 The Court takes on distinct monitoring  
6 obligations regarding a class action that  
7 the Court doesn't have as to nonclass  
8 actions. There are requirements of  
9 professional responsibility and  
10 representativeness that exist regarding the  
11 absent class members that you don't have in  
12 nonclass actions.

13 So you don't -- one does not  
14 certify class action lightly. And for this  
15 reason a court has to, as required by the  
16 rules, has to weigh the factors that are set  
17 out to determine whether this class action  
18 is really necessary. And the rules make it  
19 quite clear that a class action is not the  
20 first choice. That if there are -- the  
21 class action has to be superior to other  
22 methods of resolution because the normal  
23 method of resolution of disputes in our  
24 litigation is by individualized litigation  
25 and not by class actions.

1           Q.       What problems would be caused by a  
2       vague or imprecise class definition when it  
3       came to notice, say?

4           A.       Well, it's particularly a problem  
5       with notice. If you -- You have to -- A  
6       court has to decide in determining what kind  
7       of notice to give to the public to identify  
8       the class members. There's going to have to  
9       be a fairly succinct way that in a newspaper  
10      ad or a TV spot or what other form of  
11      publication the court decides to use, a lay  
12      person can say, "Oh, well, I'm a member of  
13      that class."

14                   And normally class actions are  
15      identified by objective criteria: All  
16      members of a certain race who were subjected  
17      to employment discrimination at a particular  
18      factory, all the residents of a particular  
19      geographical area within two miles of a site  
20      from which radioactivity emitted who are  
21      injured in a particular kind of way.

22                   This tells the public that they  
23      are within that class, and they have to then  
24      consider whether they want to stay in the  
25      class or whether they want to exercise their

1 opt-out rights.

2 If you don't have an adequate  
3 class definition, then you undermine the  
4 notice requirement, which the Supreme Court  
5 has held to constitutional dimensions, the  
6 right to opt out and to go one's own  
7 individual way with a class action.

8 Q. Okay. Objective or definite  
9 criteria help a lay person, a potential  
10 class member, to know whether he's in or  
11 out; is that part of the problem?

12 A. Exactly.

13 Q. You have reviewed in your  
14 affidavit, Professor, some of the problems  
15 that you see with the proposed class that  
16 has been offered here. Can you just address  
17 some of those issues briefly? Let me ask  
18 you first about vagueness. What vagueness  
19 do you see in the proposed class?

20 A. Well, I read the various pleadings  
21 and various memoranda and Answers to  
22 Interrogatories. And it was not easy to  
23 come to -- to determine exactly what the  
24 definition of the class that's being  
25 proposed here is.

1           The original complaint, as I read  
2     it, was quite broad. It was simply any  
3     individual who had smoked the tobacco  
4     products of defendants. This was narrowed,  
5     thereafter, by reference to the DSMs which  
6     do provide certain criteria but those  
7     criteria are quite individualized and  
8     subjective. And, ultimately, there seems to  
9     be a three-part test that has been proposed.

10           I have a great deal of difficulty  
11     with all of those because I've not been able  
12     to find the kind of objective criteria that  
13     would overcome the vagueness and the  
14     overbreadth problem.

15           Q.     Let me just correct you on one  
16     point, Professor. I think in the original  
17     complaint the class was proposed as persons  
18     who claimed to be addicted. I don't know  
19     that that alters the balance of your --

20           A.     You're quite right. You're quite  
21     right. Thank you for that correction.

22           Q.     Let me ask you, since that  
23     complaint has been superseded, let me ask  
24     you about the proposed criteria in the  
25     amended complaint, which I take it is on the

1 table now, referring to the DSM criteria,  
2 DSM-III, I believe. What sort of vagueness  
3 or uncertainty do you see with respect to  
4 that proposed definition?

5 A. Well, the reference to the DSM  
6 criteria is certainly a considerable  
7 improvement from simply defining the class  
8 as people who are addicted because,  
9 obviously, you're going to have to have some  
10 criteria for determining who is addicted or  
11 not.

12 The problem is that the DSMs,  
13 which seem to be based on the currently-  
14 available medical knowledge about the  
15 addictive effects of nicotine, set out a  
16 series of what seem to me to be essentially  
17 diagnostic criteria.

18 And they're very individualized.  
19 They talk about such things as compulsive  
20 behavior and cravings and some very  
21 subjective factors, like anger and  
22 frustration and anxiety. A number of the  
23 behavioral aspects are not unique to  
24 nicotine addiction. They can have many,  
25 many causes.



1           It does not appear to me that one  
2 could, on the basis of some kind of a  
3 questionnaire, ask someone, for example,  
4 have you had anger, anxiety, and some of  
5 these other matters, and be able to make any  
6 kind of determination whether there's  
7 addiction or not.

8           It seems to be a very focused,  
9 individualized case which I think, as far as  
10 I can tell, would be a medical judgment as  
11 to addiction as well. One does not make a  
12 decision, a class decision, that 50 million  
13 smokers are addicted. The DSM suggests that  
14 it's -- one has to focus on each  
15 individual.

16           Q.       The DSM criteria would also be  
17 applied by a professional; would they not?

18           A.       Yes. I should think that a court  
19 clerk would not be in a position to weigh  
20 these whole number of essentially medical  
21 criteria and make that kind of judgment.

22           Q.       I think you have reviewed,  
23 Professor Sherman, one of the subsequent  
24 filings of the plaintiffs that proposed a  
25 three-part test. I think it may have been

1       dated June 8th. Does that offer a solution  
2       to the problem of subjectivity or vagueness  
3       which you see in the amended complaint  
4       definition?

5           A.       Well, the third three-part --  
6       element of the three-part test, I don't have  
7       much trouble with the first part, that all  
8       cigarette smokers who have been diagnosed by  
9       a medical practitioner. This does at least  
10      provide some kind of objective test as to  
11      whether a medical practitioner, there has  
12      actually been such a diagnosis; and,  
13      presumably, such a diagnosis could be  
14      presented as evidence and be subjected to  
15      cross-examination, if necessary.

16                   The second one is more  
17      problematic, all regular cigarette smokers  
18      who have made at least one unsuccessful  
19      effort to quit, I have doubts as to both the  
20      medical and legal sufficiency of that  
21      presumption.

22                   The third one is perhaps the most  
23      all-expansive because it strikes me as  
24      affecting a very huge number of people in  
25      the United States. It's all regular

1 cigarette smokers who have been advised by a  
2 medical practitioner that smoking has  
3 adverse health consequences and did not,  
4 thereafter, quit smoking.

5 First, this also seems to involve  
6 a sort of a presumption. And presumptions  
7 in the law are only permissible if there is  
8 compelling reason to believe that certain  
9 aspects give rise to the presumed fact. And  
10 the fact that someone continues to smoke  
11 after having been advised of the health  
12 hazards strikes me as not being established  
13 by the medical evidence or the legal  
14 evidence.

15 Just as a person continues to eat  
16 red meat after being advised by his doctor  
17 that it contains cholesterol and it's  
18 dangerous to his health, just as certain  
19 people continue not to exercise after being  
20 advised by a doctor that it's dangerous to  
21 his health not to exercise. I'm not sure  
22 that that demonstrates addiction under those  
23 circumstances.

24 But, more important, the breadth  
25 or overbreadth of these criteria seem to me

1 quite extraordinary. There is the first  
2 question of what's a regular cigarette  
3 smoker. And in the plaintiffs' answers to  
4 the interrogatories, there has been an  
5 attempt to answer that. The suggestion is  
6 that consumption -- is that exposure to, I  
7 believe it's 20 milligrams of nicotine, is  
8 sufficient to result in addiction; and,  
9 therefore, someone who's smoked a hundred  
10 cigarettes over 20 days can be considered to  
11 be a regular smoker as to whom we can find  
12 an element of addiction.

13 Again, I simply don't know of any  
14 bright line test that really does -- is  
15 willing to accept that presumption.  
16 Certainly, the DSMs do not say that a  
17 hundred cigarettes makes one addicted to  
18 nicotine.

19 There are other elements here.  
20 You have to be a regular smoker, you have to  
21 have been advised by a medical practitioner  
22 of the dangers. That's quite broad. I  
23 don't know what -- First of all, I don't  
24 know what a medical practitioner is, whether  
25 that means an M.D. or anyone who deals with

1 health. It doesn't say it has to be  
2 personal.

3 Virtually everyone in our society,  
4 I suppose, has seen doctors on television  
5 talking about the dangers of smoking, have  
6 read magazine and newspaper articles by  
7 doctors and medical practitioners warning  
8 about the dangers of smoking. So if that  
9 would suffice, it's not much of a limiting  
10 factor at all.

11 And then, finally, failure to  
12 quit, again, the judgment that someone who's  
13 smoked for 20 days and chooses not to quit  
14 is doing so only because of addiction  
15 doesn't seem to me to be consistent with the  
16 DSMs because the DSMs provide no such bright  
17 line determination. The DSMs seem to  
18 indicate that a very individualized  
19 diagnosis must take place.

20 In one of the depositions of one  
21 of the plaintiffs' medical experts, I seem  
22 to read the same thing, a recognition that  
23 people come to smoking with a whole lot  
24 of -- a whole variety of individual  
25 characteristics. Some have more willpower

1       than others. Some have more tendencies  
2       towards addiction than others. And that  
3       these sorts of determinations can't be  
4       easily based either on a class-wide basis or  
5       on some kind of bright line of this type  
6       that's suggested.

7               Q.       Do the definitions proposed here  
8       create a problem in your mind that persons  
9       who may not be addicted or may not consider  
10      themselves to be addicted would be included?

11             A.       Yes, it certainly does. The sort  
12      of presumptions that seem to be at work here  
13      don't seem to give room for the individual  
14      who says, "Well, I continue to smoke for  
15      lifestyle reasons, because of the pleasure  
16      it gave me for a variety of reasons. I'm  
17      not an addict. I've stopped and I can stop  
18      but I choose to do so as a matter of  
19      personal choice."

20             Q.       What's the problem with including  
21      people such as that within a class  
22      definition? Is that a difficulty for the  
23      Court?

24             A.       Well, there are a number of court  
25      cases that say that before you undertake the

1 laborious process of a class action, you  
2 ought to at least have some indication that  
3 there is a class out there who have some  
4 kind of injury and who want to address that  
5 injury. And we -- it's quite uncertain  
6 under this kind of definition as to whether  
7 you've really identified that group of  
8 people.

9 It also seems so broad that under  
10 the individualized definitions of addiction,  
11 it would appear that you're going to have  
12 some people who might well be diagnosed as  
13 addicted and you might have a large number  
14 of people who would not be diagnosed as  
15 addicted, don't consider themselves to be  
16 addicted, have no desire to make a claim of  
17 addiction.

18 Q. In your affidavit you raise a  
19 question with respect to the inclusion of  
20 future smokers. Why is that a problem?

21 A. Well, the class definition, as I  
22 understand it here, would include not only  
23 the 50 million present smokers, if that  
24 number is correct -- I'm simply taking that  
25 out of the documents I've read -- it also

1 includes, apparently, people who have quit  
2 smoking, who no longer smoke, but who,  
3 because they meet the test here of having  
4 once smoked a hundred cigarettes, for  
5 example, and continued smoking after  
6 receiving warnings were addicted at an  
7 earlier time, even though they've quit at  
8 this time.

9 That would add -- I don't know how  
10 many more people. Maybe we're talking about  
11 50 million. Then we've got the future  
12 class --

13 Q. I think it's about -- in excess of  
14 40 million, I think, is the figure the  
15 Surgeon General has used.

16 A. Ex-smokers?

17 Q. Yes.

18 A. If that's the figure, we're  
19 talking between present smokers of 50  
20 million and former smokers who, even though  
21 they've quit, may still fit this definition  
22 of having been addicted at one time and,  
23 therefore, under the theory of this case  
24 would be entitled to damages for emotional  
25 harm.



1                   And then there's the future  
2           class. Every day after -- Every day new  
3           class members will be added, people who have  
4           quit previously and began smoking again, and  
5           first-time smokers beginning. And after a  
6           certain period of time a hundred cigarettes,  
7           or whatever it is, the presumption will kick  
8           in that those people are also members of the  
9           class.

10                   It creates -- We're talking here  
11           about an unprecedented number of class  
12           members. I can think of no class action  
13           even vaguely approaching the numbers of  
14           fifty or a hundred million class members.  
15           That, in itself, the sheer numbers of  
16           figuring out how to get notice to a third of  
17           our population or more, how to process back  
18           their opt-outs and, ultimately, how to deal  
19           with the remedial phases are staggering.

20                   The future class actions raise  
21           some particular problems. And that is  
22           that -- regarding notice. Even if one can  
23           craft a fairly succinct definition of the  
24           class so that someone can watch a TV spot  
25           and say, "Oh, that's me, I'm in the class

1 and I have to now decide whether to opt out  
2 or not," what do you do about someone who  
3 does not smoke today?

4 That person, of course, has no  
5 reason to believe that he's in the class  
6 because he's not in the class. But at some  
7 future time that person begins to smoke,  
8 that person is presumably a member of the  
9 class, and yet he's not had the opportunity  
10 of notice and opt-out.

11 Q. You also raise an issue with  
12 respect to the inclusion of persons in the  
13 United States, territories, possessions, et  
14 cetera. What issues does that raise in your  
15 mind?

16 A. Well, it contributes, again, to  
17 the enormous size of the class. And I have  
18 no way of judging how many people we're  
19 talking about who are -- who this would add  
20 to the class.

21 It also adds to the disparate  
22 nature of the class. It poses, in  
23 particular, something I'll talk about later,  
24 which is the choice of law problem. This is  
25 a class action filed under diversity

1 jurisdiction of a federal court.

2 Under the Erie Railroad doctrine,  
3 the federal court is obligated to apply the  
4 substantive law of the state in which it  
5 sits. In the case of a Louisiana federal  
6 court, it is required to apply the Louisiana  
7 choice of law doctrines. And those choice  
8 of law doctrines in these cases will, in  
9 turn, send the court to apply the laws of  
10 the 50 different states from which the class  
11 members come.

12 It's an enormous problem because  
13 of the diversity of law on a number of  
14 matters which I'll address later. It  
15 increases that problem when you add the  
16 territories and possessions. If we're  
17 talking about dozens of American territories  
18 and possessions, for one thing, some of  
19 these territories -- I'm not an expert on  
20 the law of territories and possessions.  
21 What little I know is that the laws  
22 sometimes differ even more markedly among  
23 the territories and possessions than they do  
24 among our states.

25 American Samoa, I understand, has

1 its own legislature and, obviously, a very  
2 different legal and cultural tradition than  
3 the United States. So in purpose of the  
4 choice of law, it simply adds to that  
5 problem.

6 The notice problem is also  
7 exacerbated. It's a serious enough problem  
8 to figure out how you're going to give  
9 succinct notice to more than a third of the  
10 population in the continental United States  
11 in the 50 states. If it's also going to be  
12 to American possessions and territories  
13 around the world, many of whose inhabitants  
14 don't speak English, it simply adds to the  
15 notice problem and the representational  
16 problem of how American representative class  
17 members are going to be -- adequately  
18 represent these people from different  
19 cultural traditions.

20 Q. I certainly don't want to  
21 encourage you to talk about the content of  
22 territorial law if you're not an expert.  
23 I'm reasonably confident, however, that  
24 nobody here is in a good position to  
25 challenge you. I certainly am not.

1           Let me ask you about the problem  
2           that you foresee in including relatives,  
3           significant others and so forth in the  
4           definition of proposed class members?

5           A.       Well, this, of course, further  
6           adds to the size of the class. We're now  
7           talking about a group of people who,  
8           presumably, have some kind of rights of  
9           survivorship for class members who may have  
10          died or some kind of correlative rights for  
11          class members who are still alive.

12                   What's the source of those  
13          rights? One would have to look to the law  
14          of the particular jurisdiction in which the  
15          smoker and possibly these various family  
16          members and relatives and significant others  
17          live.

18                   If there are differences, as I  
19          believe there are in questions of liability  
20          involving product liability and  
21          misrepresentation and so on, those  
22          differences, I think, are particularly  
23          marked regarding the rights and correlative  
24          rights of family members and relatives and  
25          significant others.

1                   Significant others, for example,  
2                   this is an emerging area. Some states don't  
3                   recognize rights at all, some of them  
4                   recognize them in very hybrid forms, some in  
5                   particular forms. The term "relatives" is  
6                   not defined. First cousins, second cousins,  
7                   third cousins, do we look to the law of  
8                   survivorship to determine who those  
9                   relatives are? I would suppose that that  
10                  was what one would have to do.

11                 But, again, we have the problem of  
12                 looking to the disparate choice of laws.  
13                 Some jury somewhere is going to have to  
14                 decide whether a particular relative falls  
15                 within that category or not or whether a  
16                 significant other satisfies the definition  
17                 in California for whatever survivorship  
18                 rights a significant other may have. It  
19                 enormously complicates an already  
20                 complicated class action.

21                 Q.         Given the nature of the problem  
22                 we're dealing with here, Professor Sherman,  
23                 why can't the parties or the Court simply  
24                 try to evolve a working definition, just let  
25                 things progress, and sort things out a

1 little bit later perhaps? Is there any  
2 requirement that this decision really be  
3 made, faced and decided now?

4 A. Well, I've given earlier the  
5 various steps in a class action, that it's  
6 fairly important to have an adequate  
7 definition having to do with enabling the  
8 judge to make a certification decision,  
9 getting out notice and receiving opt-outs,  
10 structuring the discovery and the form of  
11 the trial itself and defining the res  
12 judicata issue.

13 If one has an inadequate class  
14 definition and says, well, at some later  
15 time we'll simply determine the criteria,  
16 then you run the risk that you're going  
17 to -- that you're undertaking this very  
18 complex process and that you're going to  
19 make mistakes along the way because, in  
20 fact, you're not able to decide those issues  
21 adequately. And that's a serious problem.

22 MR. McDERMOTT:

23 Okay. We've been going about an  
24 hour. Why don't we take a five-minute  
25 break, if that's agreeable.

1 MR. BRUNO:

2 That's fine.

3 MR. BROWN:

4 Off the record at 10:28:32.

5 (Whereupon a brief recess was  
6 taken at this time.)

7 MR. BROWN:

8 We're back on the record at  
9 10:38.

10 EXAMINATION BY MR. McDERMOTT:

11 Q. Professor Sherman, I'd like to  
12 turn now to the issue or question of  
13 manageability. Can you spend just a moment  
14 and tell us why manageability is an  
15 important consideration in making a class  
16 certification decision?

17 A. Well, a court has to assess before  
18 making a certification decision as to  
19 whether this piece of litigation can go  
20 forward as expected in a way that will  
21 ultimately result in the proper termination  
22 without -- with the efficiencies that we  
23 hope will be achieved in a class action and  
24 without undue problems that will crop up  
25 that will either sidetrack the class action



1 entirely or detract from the efficiencies or  
2 cause unfairness and due process problems.

3 So one has to believe that you can  
4 take this whole ball of wax and work with it  
5 in a manageable way.

6 Q. Is manageability more of a concern  
7 when it comes to mass toxic tort cases than  
8 in other kinds of cases or mass tort cases?

9 A. Yes, it is. In both manageability  
10 and commonality problems, the familiar  
11 admonition in the 1966 advisory committee  
12 notes to Rule 23 threw up a warning that  
13 mass torts are not normally suitable for  
14 class certification.

15 I don't consider that to be an  
16 absolute. Indeed, the cases have not  
17 treated it as an absolute but it does  
18 indicate a warning that, because of the very  
19 individualized nature of a lot of the issues  
20 in tort cases, that you've got some problems  
21 to overcome if you're going to use a class  
22 action device.

23 Q. That advice or that caution was  
24 issued almost three decades ago. Do you  
25 think it still has currency today?

1           A.       Not as an absolute, as I  
2       indicated, but as a toxin or a warning. I  
3       think that there is something about the  
4       nature of mass torts, that often because of  
5       the heavily individualized nature of a lot  
6       of the issues, that makes it more difficult  
7       to resolve it through a class action  
8       device.

9                       And I think that -- I've suggested  
10      that in my statement here that my own method  
11      of analysis is kind of using a continuum in  
12      which there are cases that have, mass tort  
13      cases that have highly individualized  
14      natures that should not be certified and  
15      then cases that have great commonalities  
16      that should be certified.

17           Q.       Well, let me ask you to spend just  
18      a few moments and expand on this concept of  
19      a continuum. Could you basically give us a  
20      little bit more detail on your thinking  
21      here?

22           A.       Well, on one end of the continuum,  
23      the end that favors certification, you have  
24      the single accident, single event kind of  
25      toxic tort, the airplane crash, the collapse

1 of the Hyatt Skywalk and so forth.

2 These cases, I think, often are  
3 suitable for class certification because  
4 they focus on a single event or a single  
5 course of conduct, often a single  
6 geographical location. It does not tend to  
7 give rise to lots of the individualized  
8 issues and defenses that other kinds of  
9 toxic tort cases give rise to. For example,  
10 statute of limitations problems.

11 Statute of limitations normally  
12 runs from that event, so you're not going to  
13 have to inquire into the knowledge of each  
14 individual plaintiff as to when the statute  
15 of limitations began to run because you have  
16 an event to do it, so it's not going to have  
17 to be an individualized issue.

18 Q. I think in your answer you used  
19 the word "toxic" tort. Did you mean "mass"  
20 tort?

21 A. I'm sorry. If I did, I mean mass  
22 torts here. In the single-accident  
23 situation. Often these single-accident  
24 situations do not give rise to the kinds of  
25 defensive issues that are present in some

1 other kinds of cases.

2 Rarely is there an assumption of  
3 risk or a contributory or a comparative  
4 negligence issue when a plane falls out of  
5 the air or where the skywalk collapses. So  
6 one is not going to have to compare the  
7 conduct of the plaintiff and defendant and  
8 do an individualized analysis of plaintiff  
9 behavior as opposed to the common questions  
10 relating to the defendants' behavior.

11 Q. This is on questions of liability,  
12 presumably?

13 A. On questions of liability, yes.

14 Q. There are still individual issues  
15 of damages?

16 A. And there are still individual  
17 issues of damages. Courts have come to say  
18 that in certain situations it may be  
19 permissible to bifurcate and hold mini  
20 trials or individualized determinations of  
21 damages, and in some cases damages may be  
22 ascertainable by a formula that can be  
23 applied class-wide. If you fall in that  
24 category, this also puts it in that category  
25 of cases where it is more feasible to use a

1 class action.

2 Q. Can you tell us what other points  
3 on the continuum signal different kinds of  
4 treatment or different considerations?

5 A. Well, I just talked about the --  
6 one end of the continuum, the single  
7 accident sort of case that I think is often  
8 suitable. Then there are cases in the  
9 middle, where I would put them in the  
10 middle, in which there are individualized  
11 issues in which the harm has not necessarily  
12 arisen from a single event or single  
13 accident but, nonetheless, there are very  
14 strong commonalities. And often this is  
15 very much up to the discretion of the  
16 individual judge who has to judge the  
17 manageability and other issues.

18 An example would be environmental  
19 contamination cases in which the class is  
20 all the people within a couple of mile  
21 radius of a toxic dump, of a plant that  
22 emitted radiation; in which a court can  
23 focus on a particular course of conduct by  
24 the defendant; in which it can identify the  
25 class members because they're geographically

1 present; in which it has some confidence  
2 based on the expert testimony that these  
3 people are clearly within the area in which  
4 harm is very, very likely; and in which,  
5 very probably, there will not be defensive  
6 issues having to do with assumption of risk  
7 and comparative negligence, statute of  
8 limitations is rarely a problem because you  
9 can key it to a particular event and so  
10 forth.

11 So these kinds of cases, you have  
12 them going lots of different ways, but there  
13 have been a number of courts that have been  
14 willing to certify cases under those  
15 circumstances.

16 Then on the other end of the  
17 continuum are the cases that I think  
18 certification is not appropriate. And  
19 they're cases, very often toxic tort kinds  
20 of cases, where first there is a vast  
21 difference in the manner of exposure. Class  
22 members are exposed at different times, in  
23 different places, in very different ways, to  
24 the substance or the conduct.

25 Where the means of exposure or

1 ingestion or use of the substance or the  
2 product is -- involves a degree of voluntary  
3 choice, unlike someone in certain asbestos  
4 cases who were exposed to asbestos because  
5 they worked in a particular plant at a  
6 particular time, who did not assume the  
7 risk, in fact, did not even know of the  
8 presence of the asbestos there, in these  
9 kinds of cases, if the exposure involves an  
10 intermixture of plaintiff conduct and  
11 plaintiff choice, then you give rise very  
12 often to defensive issues of assumption of  
13 risk and comparative negligence depending  
14 upon what the state law is.

15 And that causes an additional  
16 problem of having to bifurcate or  
17 polyfurcate the class, the trial into  
18 numerous mini trials or individualized  
19 trials, so a jury can determine the  
20 individualized issues as to these kinds of  
21 damages. And then the damages themselves,  
22 if it's not amenable to a formula, then  
23 you're going to have to have individual  
24 trials or mini trials as to the damages.

25 And when those damages are

1 interwoven with liability issues, then the  
2 class-wide trials may not be efficient at  
3 all because you're going to have to repeat  
4 the same evidence in the individualized  
5 trials or the damage trials. And so the  
6 perceived efficiencies of a class action  
7 evaporate.

8 Q. I take it there are no bright  
9 lines which place a given situation in one  
10 place in the continuum or another, that  
11 basically a careful analysis of each  
12 situation is required?

13 A. That's right. And it's a  
14 difficult job for a judge to have to weigh  
15 these numerous factors and decide how they  
16 come out.

17 Q. Have you looked at some of the  
18 factors that bear on this kind of decision  
19 in performing your evaluation here?

20 A. Yes.

21 Q. I'd like to review a couple of the  
22 issues that you mentioned, the individual  
23 issues that I think you said give rise to  
24 some manageability problems. What  
25 individualized issues have suggested



1       themselves to you based on your review to  
2       date?

3           A.       Well, I've talked in my statement  
4       about the issues that seem to me to raise  
5       problems of individuation. The first one is  
6       the question of nicotine dependence. As  
7       I've already talked about, when we talked  
8       about the class definition, I don't think  
9       there is a bright line formula that will  
10      permit class determination of 50 million or  
11      so people to determine class-wide that those  
12      people are addicted.

13           The best medical information seems  
14      to suggest that there are a large number of  
15      individuated factors that have to be  
16      considered in a diagnostic setting. And  
17      that, therefore, when one has -- when one  
18      comes to trial, there is a right to -- for a  
19      jury to make that determination of nicotine  
20      dependence.

21           And it's going to depend upon the  
22      individual characteristics that someone  
23      brings to smoking, to the circumstances of  
24      the smoking, all the various diagnostic  
25      features that we talked about. So I think

1       that you are not going to be able to do this  
2       in a class-wide trial.

3           Q.       What about the issue of causation,  
4       the need to prove that, even if there is  
5       dependence, that damages were caused  
6       thereby?

7           A.       Whether an individual has -- In  
8       other words, causation as to an individual  
9       who claims emotional harm is normally an  
10      individual question. Emotional harm is a  
11      particularly individual sort of thing  
12      because we recognize that people have  
13      different dispositions. Some people suffer  
14      more than others. And juries have always  
15      been allowed to make a determination that  
16      people are not impacted in identical ways  
17      with pain and suffering and emotional harm  
18      and those sorts of things.

19                 So normally the question of  
20      causation as to whether the harm claimed has  
21      been caused by the product or by the conduct  
22      of the defendant is going to be an  
23      individual issue.

24                 There have been cases, for  
25      example, the Jenkins case, involving

1 asbestos in which a court was willing to say  
2 that certain kinds of class-wide issues  
3 could be decided on a class-wide basis.  
4 Those -- The primary issue, according to the  
5 Fifth Circuit that was allowed to bring the  
6 case into class certification, was a state-  
7 of-the-art defense that focuses not on  
8 individual plaintiffs but on the conduct and  
9 the knowledge of the defendant. So that's  
10 an easy one, that's not a -- for a common  
11 trial.

12 Q. Let me ask you to address some  
13 individualized issues or problems of proof.  
14 How about defenses? Are there defenses  
15 which you foresee being raised here which  
16 would call for individualized consideration?

17 A. Yes, I think this case in  
18 particular raises the likelihood that the  
19 defendants will claim that, unlike the  
20 passive worker in a plant where there's  
21 asbestos in the insulation, that these  
22 individuals have chosen to continue smoking  
23 after reading warnings on the pack, after  
24 being familiar with the dangers of smoking,  
25 that they've stopped smoking at various

1 times, that perhaps they've smoked for good,  
2 and that indeed they -- this was voluntary  
3 conduct, that they appreciated the danger,  
4 and that there's either assumption of risk  
5 under that wide range of assumption of risk  
6 defenses that exist under the common law of  
7 our various states or that there is either  
8 contributory negligence or comparative  
9 negligence.

10 And a very high percentage of our  
11 states have now moved to some kind of  
12 comparative negligence scheme, although they  
13 differ quite markedly, and that in some  
14 fashion the conduct of the plaintiffs is  
15 also causative. I don't know how you can  
16 determine on a class -- in a class-wide  
17 basis what the degree of comparative  
18 negligence of a smoker is under these  
19 circumstances.

20 Q. With respect to emotional  
21 distress, are there -- does the law  
22 recognize individual considerations that  
23 have to be taken into account there, just  
24 the severity of the damage or distress?

25 A. Well, the claim of emotional

1 distress, as I understand it, is -- requires  
2 that there be a certain high level of  
3 severity. Those states that have recognized  
4 the claim for emotional distress do not say  
5 that one can collect damages for some minor  
6 distress. It requires a consideration of a  
7 high level of severity.

8 And for that reason, again, I  
9 don't know how you could make a class-wide  
10 determination that 50 million smokers had  
11 been subjected to emotional distress. It  
12 requires a high degree of severity. People  
13 have different kinds of tolerances.

14 As indicated by the expert  
15 testimony of this doctor that I read, he  
16 indicated that some people -- that people  
17 are very different in their dispositions as  
18 they relate to these matters. And one is  
19 going to have to both look at it  
20 individually; and then when one comes to  
21 assessing the damage part of it, all of that  
22 evidence of severity which might be used in  
23 the liability phases is probably going to be  
24 relevant in the damage phase.

25 So even if one tries to bifurcate

1 or polyfurcate into cutting this thing into  
2 little individualized trials on different  
3 issues, even if -- there's questionable  
4 efficiency because of the overlapping nature  
5 and interwoven nature of these issues.

6 Q. Do you see individualized issues  
7 in the fraud and misrepresentation claims  
8 being advanced?

9 A. Yes, as far as I can tell, and I'm  
10 not an expert in the law of misrepresenta-  
11 tion, but I have dealt with misrepresenta-  
12 tion in the context of class actions, I've  
13 had occasion to research it in a number of  
14 jurisdictions, it seems that reliance and  
15 materiality is a requirement for common law  
16 fraud and misrepresentation in most  
17 jurisdictions; most, if not all.

18 There are some California cases  
19 that have been cited that suggest that the  
20 fraud on the market concept that waives the  
21 requirement of reliance in the particular  
22 circumstances of an organized stock market  
23 in which people buy stock in reliance and  
24 belief that the price set by the open market  
25 is based on full knowledge of the true

1 facts, there's been a suggestion in  
2 California that that might be extended  
3 beyond that particular situation, although  
4 that vastus case appears to have been  
5 severely limited by another case.

6 But that's one jurisdiction that  
7 I, from my knowledge, is not representative  
8 of the common law of fraud or misrepresenta-  
9 tion around the country which seems to  
10 require reliance and materiality. And  
11 that's a very individualized consideration.

12 Q. What about the consumer protection  
13 statutes? Is there anything in those  
14 statutes which would present individualized  
15 issues?

16 A. Again, I'm not an expert in  
17 consumer protection statutes. But there  
18 seems to be a wide disparity in consumer  
19 protection statutes. You find some  
20 disparities in the elements of what makes  
21 out a cause of action. They differ on the  
22 degree of proof that's required, the  
23 shifting of burdens, various kinds of  
24 presumptions, they have different statute of  
25 limitations, the remedies differ markedly.

1           And if we're talking about causes  
2 of action arising under the 50 state  
3 consumer protection statutes, one is going  
4 to have to focus on those particular  
5 statutes, so it's going to be very difficult  
6 to have a class-wide trial in which a jury  
7 can make determinations that are going to be  
8 useful in applying 50 disparate laws.

9           Now, in terms of individuality,  
10 even in some of the consumer protection  
11 statutes, some of which do not require  
12 reliance and alter the degree of reliance  
13 required, you nonetheless have individuated  
14 issues, such as when the individual became  
15 aware for the running of the statute of  
16 limitations, and questions like that.

17           Q.     Your discussion of the consumer  
18 protection statutes perhaps is a natural  
19 point for asking you to address more broadly  
20 the choice of law problems that you see  
21 presented here and why that compounds  
22 manageability concerns for the proposed  
23 class.

24           A.     Well, I think it's been kind of  
25 common -- the common judgment of class



1 actions that a nationwide class action in a  
2 diversity case is a very, very difficult  
3 thing to manage. Most of the nationwide  
4 class actions that have been certified are  
5 federal question cases where the law arises  
6 under the federal antitrust statutes,  
7 federal securities fraud statutes, federal  
8 civil rights statutes.

9 Those nationwide class actions, if  
10 they can overcome the other kinds of  
11 problems, at least have one uniform federal  
12 law that can be applied. It is much more  
13 difficult in a diversity case where you have  
14 to look to the laws of the 50 states, and in  
15 this case the territories and possessions as  
16 well, in order to apply it.

17 Courts have used some creative  
18 techniques in trying to deal with these  
19 when, for example, a case involves some  
20 parties to whom California law applies and  
21 some parties to whom Texas law applies; and  
22 there have been cases in which courts have  
23 convened two juries that sit simultaneously  
24 and hear the evidence, and then they're  
25 instructed according to the particular law

1 of their particular state.

2 This is, obviously, not feasible  
3 when you're talking about 50 different  
4 laws. Courts have sometimes tried mini  
5 trials involving the particular laws. And  
6 they sometimes attempt to group together  
7 like states. The problem here is that  
8 we're -- I've already talked about the  
9 number of issues in which the states  
10 differ.

11 And we're talking about what seems  
12 to me a very large number of individuated  
13 trials or mini trials on a whole number of  
14 issues, running from causation to statute of  
15 limitations to defensive matters like  
16 assumption of risk and comparative  
17 negligence to, finally, remedies.

18 And if it was just one issue in  
19 which -- having to do with a single cause of  
20 action such as strict liability and in which  
21 you might be able to find, for example, five  
22 different groupings of states that might  
23 fall in five categories, one might  
24 conceivably attempt to do it that way. In  
25 this case we have multiple issues, many,

1 many issues with vast differences between  
2 the states and I'm not at all sure that the  
3 groupings are very feasible in most of these  
4 situations.

5 Q. I guess it would be pretty much of  
6 a task, a daunting task, even to determine  
7 what the law of all the jurisdictions was on  
8 all the various questions presented by these  
9 complaints or claims?

10 A. Well, a judge in a nationwide  
11 diversity class action has his work cut out  
12 for him. Assuming that, as I believe would  
13 be the case, that there would be -- that the  
14 judge would have to apply the laws of the 50  
15 different states, subclassing can sometimes  
16 help solve these kinds of problems; but a  
17 subclass -- 50 subclasses for the members of  
18 different states would only be the beginning  
19 because you would have to subclass for  
20 differences in each one of these issues that  
21 we've talked about. And so we're talking  
22 about a very large series of permutations.

23 Q. Why can't this problem be solved  
24 just by the Court picking a single body of  
25 law? Why can't some decisions be made just

1 to simplify?

2 A. Well, the Supreme Court in the  
3 Shutts case indicated that the forum court  
4 may not simply select the law of the forum  
5 to apply to a class action; that it can only  
6 apply the law of the forum if there are  
7 significant contacts with the members of the  
8 class in the forum.

9 I don't know enough about the  
10 facts of what contacts these -- the members  
11 of this class action might have with  
12 Louisiana, but it does not appear to me that  
13 that Shutts requirement could be satisfied.

14 So the Louisiana court is not  
15 going to -- just as in Shutts where the  
16 Kansas court attempted to deal with a  
17 multi-state class action by applying its own  
18 law, the court in Louisiana is not going to  
19 have the right to do so under the  
20 constitutional constraints of Shutts.

21 And Louisiana choice of law  
22 doctrine will, instead, also send the Court  
23 to apply the law that has either the most  
24 significant contacts or certain other types  
25 of contacts. So it seems very likely that

1 we will have multiple laws applied in this  
2 case.

3 A federal -- There's also the  
4 problem of federalism that I should mention  
5 here. Since Erie Railroad versus Tompkins,  
6 we've recognized that a federal court does  
7 not have the power to determine the toxin  
8 case to simply determine a federalized  
9 choice of law doctrine.

10 That is a matter of substantive  
11 law, that's a policy choice for the state,  
12 and a federal court sitting in a diversity  
13 case has got to follow the state law on  
14 this.

15 Q. How do the choice of law problems  
16 that you or complexities that you have  
17 outlined affect the notice issue?

18 A. Well, I've thought about what it  
19 would take to draft a fairly succinct notice  
20 that could appear on a TV spot or in a  
21 newspaper ad. And it's mind-boggling to  
22 think of what is going to have to be told to  
23 the class members so that they can  
24 intelligently exercise their right to opt  
25 out.

1           Each -- The class members in each  
2 state will have a very different set of  
3 rights, substantive rights, statute of  
4 limitations rights, defenses that are  
5 available against them and so forth. And it  
6 will vary, of course, with the law of each  
7 of the 50 states.

8           Even if one can conceive of an ad  
9 that would go out in each of the 50 states  
10 just based on that state's law, it's still  
11 going to be very difficult to inform them of  
12 the wide range of issues in this case  
13 because those issues, those defenses, for  
14 example, are very individuated. And before  
15 one opts out, one must have some notion of  
16 what the parameters of the case are.

17           I think the problem of notice is  
18 considerably complicated by the choice -- by  
19 the broad choice of law standards that are  
20 going to have to be applied in the  
21 individuated nature of the issues.

22           Q.       Let me ask you to address a  
23 further complication, and that is personal  
24 injuries, injuries other than addiction.  
25 How does that issue affect the manageability

1 of the proposed class in this case?

2 A. Well, frankly, I'm confused by the  
3 pleadings and the documents that have been  
4 filed in this case as to know exactly what  
5 the plaintiffs' position is on injuries that  
6 arise not from addiction, that is, the  
7 emotional harm that they claim from being  
8 addicted, but from the use of tobacco, like  
9 lung cancer.

10 The complaint is not entirely  
11 clear. The complaint in Paragraph 5  
12 mentions, for example, loss of consortium  
13 and some other elements that seem to suggest  
14 that there is a claim relating to the  
15 tobacco injuries and not the addiction  
16 injuries. But it's unclear to me.

17 In the interrogatories it is  
18 stated that the plaintiffs are not seeking  
19 to represent the class members for those  
20 tobacco-related injuries. But then it goes  
21 on to say, however, those common issues that  
22 will be decided here may be preclusive in  
23 this or in other litigation, suggesting to  
24 me that they believe that there's a  
25 collateral estoppel impact as to these

1 common issues.

2 If it's in this litigation, the  
3 only way that a class member, for example,  
4 who is a class member but also has lung  
5 cancer could have his lung cancer injuries  
6 litigated would be to intervene as he would  
7 be entitled to do as a class member, which  
8 would considerably complicate the case by  
9 bringing in these individuated issues; or to  
10 seek from the class representatives and  
11 attorneys a right to be represented on those  
12 issues. If the individuals -- So it is not  
13 entirely clear to me what is being litigated  
14 here.

15 I might add one further aspect.  
16 In the claim for medical monitoring, it is  
17 specifically stated that medical monitoring  
18 is sought to identify those people who have  
19 tobacco-related diseases as differentiated  
20 from addiction claims.

21 So, apparently, what is going on  
22 here is we are looking at a cause of action  
23 based on the various claims that are being  
24 made here. Some of these -- some of the  
25 class members' claims are being presented in



1 the class action and some are not. And I  
2 think there's a very serious risk of  
3 splitting the cause of action.

4 Q. Why don't you explain to us what  
5 the problems of splitting causes of action  
6 is, why that poses a dilemma for the Court  
7 or for plaintiffs?

8 A. Virtually all of the states have  
9 now accepted the notion of res judicata, the  
10 transactional notion. And as far as I can  
11 tell in reading Louisiana statutes, this is  
12 also followed; that one must -- that if one  
13 sues for some sort of claim arising out of a  
14 particular transaction, one must sue for all  
15 of the relief that he's entitled to out of  
16 that particular transaction.

17 And if one sues for only some of  
18 the relief and later tries to file a second  
19 suit, he will be charged with splitting his  
20 cause of action and he'll be barred by res  
21 judicata from doing so.

22 The question here is that if a  
23 class member has both a claim for emotional  
24 injury due to addiction and also has a  
25 tobacco-related disease or health problems,

1 is that splitting the cause of action? The  
2 emotional -- The claim for monitoring  
3 actually addresses specifically the  
4 tobacco-related diseases. That further  
5 complicates the splitting problem because he  
6 is -- he will be recovering as a member of  
7 the class for at least the medical  
8 monitoring part of tobacco-related diseases.

9 I think -- I can't predict how  
10 future courts may treat someone who has been  
11 a member of the class and, three years  
12 later, files a suit for lung cancer and for  
13 the injuries arising from lung cancer. But  
14 I do know that there are very, very serious  
15 questions of splitting the cause of action  
16 that may well preclude that second suit.

17 Given that risk, I don't know how  
18 anyone who has tobacco-related diseases and  
19 who gets adequate legal advice -- and, of  
20 course, many class members may not get  
21 adequate legal advice on the kinds of notice  
22 they will get to this class action -- could  
23 do anything but attempt, also, in this  
24 particular suit to recover to avoid the  
25 splitting -- for their tobacco-related

1 injuries to avoid splitting the cause of  
2 action. And if that happens, this is going  
3 to be an enormously complicated suit.

4 Q. I suppose the other alternative  
5 would be for persons who have or think they  
6 have personal injuries to opt out?

7 A. Yes.

8 Q. But I guess that would affect the  
9 utility of the class?

10 A. Well, if one believes that the  
11 large members -- large numbers are going to  
12 opt out, it may affect the utility of the  
13 class. One of the problems is whether,  
14 through a publication of this type in which  
15 you believe the class might consist of a  
16 hundred million people, whether you're going  
17 to be able to get adequate notice of the res  
18 judicata risk to people who are suffering  
19 tobacco-related health conditions.

20 It's even a more serious problem  
21 with people who develop those conditions in  
22 the future as to -- who would not even be  
23 aware at the present time that they may have  
24 tobacco-related health conditions and would  
25 not know at the time they received the

1 notice that this may be their last opt-out  
2 opportunity.

3 I'm not sure how the cases would  
4 come out there. I think that's a doubtful  
5 area. It's more problematic than the case  
6 of the individual who has present  
7 tobacco-related health conditions and who  
8 goes forward as a class member, obtains  
9 relief for medical monitoring regarding  
10 those matters but does not raise the other  
11 claims he has.

12 Q. Why can't some of these problems  
13 be solved by creative bifurcation, by some  
14 way of trying to segregate from the issues  
15 that you raise that cause problems a core  
16 group of issues that might not present such  
17 complexities?

18 A. Well, the problem of individual  
19 issues in class actions can sometimes be  
20 solved by bifurcation or polyfurcation. The  
21 best example is that over the years the  
22 courts in various class actions have come to  
23 say that you can bifurcate liability and  
24 damages in certain circumstances.

25 You can bifurcate them when you

1 have the same jury decide the issue and you  
2 can bifurcate them if they are not so  
3 interwoven, and this is the Supreme Court's  
4 decision of 60 years ago in the gasoline  
5 products case, they are not so interwoven,  
6 the issues of liability and damages are not  
7 so interwoven that there will be uncertainty  
8 and confusion.

9 There are many cases in which  
10 courts have allowed putting off the  
11 determination of damages, particularly where  
12 those damages can be determined by a  
13 class-wide formula by an administrative  
14 process.

15 For example, in the Corrugated  
16 Container case where the damages, it was  
17 determined that there was a percentage of  
18 noncompetitive price rise caused by the  
19 price fixing of the defendants, and that  
20 that could be applied across the board to  
21 all plaintiffs, and all you needed to do was  
22 set up an administrative process by which  
23 they could, by affidavit and proof,  
24 demonstrate how many units of corrugated  
25 container they had purchased. And this

1        could be multiplied by the formula and,  
2        administratively, they could be awarded  
3        their damages.

4                That's not feasible in a case  
5        where we're talking about emotional harm  
6        injuries and tort type injuries.

7                Q.        Well, in the instance of emotional  
8        harm, for example, why couldn't it be done?  
9        Why couldn't you bifurcate between liability  
10       and damages?

11              A.        Well, emotional harm has a  
12       particular problem. It's the one I  
13       mentioned earlier, that part of the claim of  
14       proving the liability for emotional harm is  
15       that it has to be particularly severe. So  
16       even if you had a liability trial as to the  
17       emotional harm to a particular individual,  
18       the evidence of severity is going to have to  
19       be presented. And if you then have to have  
20       a damage trial, that same evidence is going  
21       to have to be replayed a second time.

22                      There are not going to be  
23       efficiencies in bifurcating in this manner  
24       with emotional harm. There are going to be  
25       a number of problems of lack of efficiencies

1 of these things. You can ask some common  
2 issues. A good example is the one that has  
3 been suggested in some of the papers that  
4 I've read. And, that is, you could ask in a  
5 class-wide trial "Is nicotine addictive?"

6 Q. That's a good example, why doesn't  
7 that make sense?

8 A. The problem with that is that is  
9 not going to further the ultimate  
10 determination of this lawsuit. The question  
11 in this lawsuit is not that you narrow the  
12 question of causation. That's not going to  
13 be the crux of the case. The crux is going  
14 to be whether the -- each individual  
15 plaintiff class member is addicted and  
16 whether the harm that he claims is caused by  
17 the product.

18 A number of cases have said that  
19 where the exposure takes place under  
20 differing conditions and where individual  
21 class members bring individual personal  
22 characteristics that are going to affect the  
23 causation issue, that there is no utility in  
24 asking the generic question "Does asbestos  
25 cause cancer?", "Is nicotine addictive?"

1                   And these cases involve the  
2           tetracycline case, cases of harmful flea  
3           collars, cases of adulterated baby food. A  
4           good example is the Second Circuit decision  
5           in Agent Orange. The Court there said, "We  
6           cannot certify the class based on asking the  
7           generic question 'Does Agent Orange cause  
8           the injuries that are being alleged by these  
9           veterans?'"

10                   And the reason is that what is the  
11           relevant question is "Was this particular  
12           service member injured?" and "Did that --  
13           was that injury caused by the exposure?"  
14           And a generic answer is not going to do it.

15                   Now, it's interesting, in Agent  
16           Orange the case -- the Court was willing to  
17           certify but it was on a very different  
18           issue. They found that the overriding issue  
19           was government contract defense, a unified  
20           issue of federal law that they felt was  
21           critical to the resolution of the cases and  
22           there was enough commonality on that.

23                   Let me just cite the Jenkins case  
24           as another example. In Jenkins, Judge  
25           Parker did decide that there could be a



1 Phase 1 class-wide trial that would ask  
2 certain class-wide questions, including the  
3 generic question of whether asbestos caused  
4 certain health conditions.

5 But as I read the Fifth Circuit  
6 opinion, that's not what was critical to the  
7 Fifth Circuit upholding that judgment. They  
8 particularly stressed the fact that there  
9 was an overriding issue, the state-of-the-  
10 art issue; and that the long history of  
11 asbestos litigation had indicated that in  
12 trial after trial, days were spent in which  
13 identical evidence was put on in individual  
14 trials regarding the state-of-the-art  
15 issue. And that there would be economies by  
16 deciding the state-of-the-art issue.

17 They did -- Judge Parker also  
18 proposed, the case was never tried because  
19 it was settled, but he did propose in Phase  
20 1 to ask some of these generic questions.  
21 It may -- I can't second-guess Judge Parker  
22 on this matter and it may be -- I think  
23 there's some very dramatic differences  
24 between that asbestos case and this case  
25 that might make the generic question of

1 causation more relevant there.

2 That was a case in which the  
3 individuals were all exposed to asbestos in  
4 essentially identical circumstances. They  
5 were -- They came from a limited number of  
6 facilities in which they worked in rooms in  
7 which there was exposure to asbestos. There  
8 was no question of assumption of risk or  
9 comparative negligence.

10 And in the context of that case,  
11 it may have been useful to ask certain  
12 questions, generic questions, about the  
13 dangerous qualities of asbestos and what  
14 asbestos products were present in certain  
15 buildings at certain time periods, enabling  
16 the Court to create a matrix that might  
17 ultimately permit them to resolve some of  
18 these issues on an administrative basis.

19 I don't find anything of that in  
20 this case where we're talking about a very  
21 individual question of whether these people  
22 are nicotine-dependent, in which the manner  
23 of their use of tobacco is extremely  
24 different, having to do with matters of  
25 personal choice and personal character-

1        istics. The causation impacts them in very  
2        different ways because of the individual  
3        characteristics they bring to it.

4            Q.        I take it in the Judge Parker  
5        situation, the class was relatively more  
6        modest, too, about three thousand people  
7        rather than tens of millions. That might  
8        have helped things. And I believe those  
9        were all pending cases; were they not?

10           A.        Yes. The Jenkins case, which is  
11        the first big breakthrough for permitting  
12        class actions in asbestos cases, certainly  
13        was a very modest case. They did not seek  
14        to -- First of all, it was only pending  
15        cases in the Eastern District of Texas.  
16        There was a uniform law, Texas law applied  
17        to all of them; it was not a nationwide  
18        class action. It was a little under three  
19        thousand class members who had already been  
20        defined. And, as I say, it arose from  
21        similar exposure, geographically identical  
22        circumstances of exposure, unlike the case  
23        here.

24           Q.        I suppose the notice problems were  
25        a little bit easier to solve when you

1 already have an attorney who can get an  
2 expert interpretation as well?

3 A. Yes. A notice was not a problem.

4 MR. EBLE:

5 Objection. Leading.

6 EXAMINATION BY MR. McDERMOTT:

7 Q. Let me ask you, Professor Sherman,  
8 are there other causes of action, let me ask  
9 you to address fraud, where evidence that a  
10 bifurcated trial would have to be replayed  
11 in individual proceedings subsequently?

12 A. Well, one can certainly have an  
13 individual trial, polyfurcate a case in  
14 which you take each individual class member,  
15 and decide the fraud issues. And if I'm  
16 correct, that reliance and materiality are  
17 issues in most of our states. Those are  
18 going to be -- require an individual trial  
19 to do so.

20 Even then you're not going to save  
21 very much because you're going to have to  
22 replay this evidence for the damage phases.  
23 And in determination of the comparative  
24 negligence. So we can think of multiple  
25 polyfurcations here. Again and again, we

1 may have problems of being -- of having  
2 overlap.

3 It seems like what we ought to do  
4 with these four individuals is let each one  
5 of them try their cases individually; or if  
6 a case (sic) feels that the much less  
7 drastic step of consolidation is possible  
8 with four members and that a jury would not  
9 be unduly confused by consolidating the four  
10 cases, let it go forward as a consolidated  
11 four-case trial.

12 Q. Well, I guess that gets to the  
13 issue of superiority, Professor Sherman, and  
14 let me ask you to address that. Why is that  
15 an important consideration in making the  
16 determination of whether to certify a class  
17 or not?

18 A. Well, a court is required by Rule  
19 23 to make a determination of superiority.  
20 The presumption is that you will not use the  
21 class action device if there are existing  
22 mechanisms for dealing with this.

23 The reason is that the drafters of  
24 the rules were very conscious of the right  
25 of individual autonomy, that the normal way

1 to address these cases is by allowing  
2 individual trials in which the individual is  
3 represented by his own attorney and has  
4 control of his own piece of litigation. The  
5 Fibreboard case, the Fifth Circuit,  
6 reemphasized that, those rights.

7 If -- Well, let me stop there and  
8 see if you --

9 Q. In reviewing the problems and  
10 considering the problems that you have  
11 enumerated in your testimony, do there  
12 appear to be preferred alternatives? And  
13 can you discuss what the considerations are  
14 that might weigh for and against class  
15 action being superior or not superior?

16 A. Well, I've thought about this  
17 question of superiority because, one, is  
18 there a way that this class action could be  
19 made manageable. And I've talked about some  
20 of those, are there ways that you could do  
21 it. And I've come up wanting.

22 Then I've attempted to make a  
23 comparison with how this would go forward  
24 without a class action. I assume that if a  
25 class action is not certified here, that

1 these four cases will go -- will still be on  
2 the docket, these four individuals will  
3 still be able to try their cases.

4 As I said, there is the  
5 possibility of consolidation. That's  
6 another question. Consolidation is a much  
7 less drastic step and is less demanding than  
8 the requirements of a class action. I don't  
9 know whether there's going to be a flood of  
10 litigation based on this theory of nicotine  
11 addiction and the claim that emotional harm  
12 is compensable arising out of that.

13 Unlike the tobacco -- the asbestos  
14 litigation, this court is not faced with a  
15 flood of cases that is swamping the courts.  
16 The Fifth Circuit viewed Judge Parker's  
17 decision to resort to a class action in  
18 Jenkins as almost a last resort, that there  
19 was a flood of litigation, it was -- some of  
20 it was repetitious, and that the courts  
21 could simply not handle it.

22 But in that case, Judge Parker was  
23 certifying the class on the basis of years  
24 and years of asbestos cases that had been  
25 tried. He had tried many himself, and

1 asbestos cases had been tried in federal and  
2 state courts around the country. Lots of  
3 the issues had been determined by the  
4 asbestos litigation. Part of his complaint  
5 was we've now gotten down almost to a rote  
6 recitation of certain kinds of evidence.

7 In this particular case, there's  
8 no prior litigative history, there's some  
9 novel issues of fact and law that don't  
10 appear to me to have been resolved. They  
11 may be -- Some of the legal issues may be  
12 resolved by a Motion for Summary Judgment.  
13 If the defendants were successful on some of  
14 their motions, they might strike out whole  
15 claims here on Summary Judgment. And if  
16 those Summary Judgments are affirmed, there  
17 would be no need for courts to continue to  
18 address those claims.

19 Other factual issues may start to  
20 be determined. We may or may not see lots  
21 of cases filed. Whether lots of cases are  
22 filed may depend very much on the success of  
23 some of the earlier cases on both legal and  
24 on factual issues to juries.

25 Q. Would you like to get a drink of



1 water?

2 A. I think I'm okay, thanks.

3 MR. McDERMOTT:

4 Why don't we go off the record for  
5 a moment to change the paper.

6 MR. BROWN:

7 Changing to Videotape 2 at  
8 11:31:12.

9 (Whereupon a brief recess was  
10 taken at this time.)

11 MR. BROWN:

12 This is the head of Video 2,  
13 continuing the deposition of Professor  
14 Edward Sherman. We're on the record now.

15 MR. McDERMOTT:

16 Excuse me. I think somebody is  
17 missing. Excuse me. We're still off the  
18 record.

19 (Off-the-record.)

20 EXAMINATION BY MR. McDERMOTT:

21 Q. Professor Sherman, when we broke,  
22 you were enumerating some of the potential  
23 advantages of proceeding with individual  
24 disposition of these cases of the four  
25 representative plaintiffs. I'm not sure

1       whether you completed your list or not.

2           A.       Yeah, I was saying that the judge  
3       has to make a difficult decision as to not  
4       only how this case would be disposed of if  
5       it were a class action, and I spent a good  
6       deal of time talking about that, but also  
7       what would happen if he doesn't certify this  
8       class action.

9           I think in the case of Jenkins,  
10       Judge Parker -- and the Fifth Circuit agreed  
11       with him -- was justified in deciding,  
12       because of the long history that had  
13       resolved a number of issues, that pinpointed  
14       the importance of certain common issues,  
15       like state-of-the-art, that -- in which  
16       there were minimal problems of assumption of  
17       risk and comparative negligence and so  
18       forth, that that was probably a wise  
19       decision at that moment when the courts were  
20       clogged with asbestos cases that the courts  
21       couldn't try individually. And Judge Parker  
22       essentially said the plaintiffs were being  
23       denied their rights to get to trial because  
24       of the backlog.

25               Here there's no such flood of

1 cases, no such backlog. I have no idea  
2 whether they will develop or not. That will  
3 probably depend very much on what happens to  
4 these four cases or if there are other cases  
5 in individual litigation or in some kind of  
6 limited consolidation litigation.

7 Down the line, after some of these  
8 issues are decided, both issues of law  
9 perhaps on Summary Judgment, issues before  
10 jury trials, I would guess the litigants are  
11 going to be in a much better position to  
12 assess these. Some of the claims may drop  
13 out of the case entirely. There may be a  
14 reshaping of the issues.

15 At some future time, whether a  
16 class action might be feasible, I can't  
17 judge. But having more experience with some  
18 form of individuated litigation seems to me  
19 to counsel a caution about jumping into this  
20 very extraordinary class action.

21 Q. Has anything on the scale proposed  
22 in this class action been attempted by the  
23 courts in the United States, to your  
24 knowledge?

25 A. I can't think of a comparable

1 class action of this scale. It's quite  
2 staggering.

3 Q. Let me ask you, if you would, just  
4 to summarize your conclusion of views as  
5 having studied this situation and thought  
6 about it, could you give us a recap of your  
7 ultimate feelings about the problems and the  
8 difficulties that are presented here?

9 A. Well, this is a mass tort case.  
10 It does not fall within those categories of  
11 mass tort such as single accident cases or  
12 cases in which there is a single course of  
13 conduct or cases in which there are few  
14 individuated issues that would seem to  
15 counsel class certification.

16 In addition to the commonality,  
17 the lack of predominance of commonality in  
18 this case, I think there are severe  
19 manageability problems. Those manageability  
20 problems relate, in part, to the mammoth  
21 size of the class action according to a very  
22 vague and overbroad definition; but they  
23 also relate to problems of trying -- of  
24 realizing that individuated issues are going  
25 to have to be bifurcated or polyfurcated

1 off; they're going to have to be resolved in  
2 some fashion.

3 I don't see administrative means,  
4 such as questionnaires, or an administrative  
5 process by which a common formula could be  
6 applied to address the issues in this case.  
7 So I believe that a court is going to have  
8 to face the fact that if this is certified,  
9 a common trial of certain issues may be  
10 possible but many of those issues will not  
11 resolve the principal issues of the case.  
12 And much of that evidence that's presented  
13 at that common trial may have to be replayed  
14 when the Court has to grant individuated  
15 trials on those common issues -- on the  
16 individual issues and on the damages.

17 For all of these reasons, I think  
18 that there's some serious problems in  
19 managing this case as a class action.

20 MR. McDERMOTT:

21 I don't think I have any further  
22 questions at this time. I would offer as  
23 "Exhibits 1" and "2" that have been marked  
24 the Professor's curriculum vitae and  
25 affidavit which he has identified. And I

1 would tender Professor Sherman to you as an  
2 expert in the fields of complex litigation,  
3 including class actions.

4 MR. EBLE:

5 We reserve any objections thereto  
6 for the Court.

7 MR. BROWN:

8 Leaving the record at 11:29:39.

9 (Off-the-record discussion.)

10 MR. BROWN:

11 We're back on the record at  
12 11:48:52.

13 EXAMINATION BY MR. BRUNO:

14 Q. First, sir, how are you accustomed  
15 to being addressed? Should I call you  
16 Professor or Mr. Sherman? What is your  
17 preference?

18 A. Either one. Or Ed.

19 Q. Or Ed? Okay. All right, Ed.

20 A. I'd be just as happy with that.

21 Q. Now, you live in Austin, Texas?

22 A. Yes.

23 Q. Why are we in Washington, D.C.; do  
24 you know?

25 A. It's a little cooler than Austin,

1 Texas this time of year, I suppose.

2 Q. All right. Now, just to briefly  
3 go over some of the points made by counsel  
4 when he was reviewing your curriculum vitae,  
5 let's see, you've served as legal aid to the  
6 governor of Nevada in 1962; right?

7 A. Yes.

8 Q. Certainly, there was no class  
9 action experience that you obtained in that  
10 service; right?

11 A. That's right.

12 Q. Okay. And then it indicates here  
13 that you were a law clerk for -- was it one  
14 year?

15 A. Yes. A little less than a year.

16 Q. A little less than a year. All  
17 right. How many motions for class  
18 certification were heard by the Honorable  
19 Judge Thomason in that less than one year?

20 A. I couldn't even start to tell you  
21 because we're talking about 30 years ago.

22 Q. All right.

23 A. But class actions were not the  
24 major part of his docket, if that's what  
25 you're wondering.

1 Q. Sure. Were there any class  
2 actions on his docket?

3 A. As I recall, there were, yes.

4 Q. Do you recall how many?

5 A. There were a number. As I recall,  
6 most of the class actions had to do with  
7 civil rights and some prisoner litigation,  
8 that sort of thing. But I can't tell you  
9 how many. I have no idea.

10 Q. All right. Do you recall how many  
11 of them that you actually worked on?

12 A. Well, I worked on just about  
13 every, every case that had hearings or  
14 pleadings and so on. I would have at least,  
15 at least been involved in some fashion.

16 Q. Okay.

17 A. I was the only law clerk at that  
18 time.

19 Q. Oh, I see. All right. Okay. But  
20 you have no independent recollection of any  
21 of that work with regard to class actions  
22 while in the employ of the Honorable Judge  
23 Thomason; correct?

24 MR. McDERMOTT:

25 Object to the form of the



1 question.

2 A. I remember various class actions.  
3 I can't give you the specifics or the case  
4 names, if that's what you're asking.

5 EXAMINATION BY MR. BRUNO:

6 Q. Okay. All right. Then you went  
7 into the private practice of law.

8 A. Right.

9 Q. And you practiced with the firm of  
10 Mayfield, Broadus, MacAyeal --

11 A. MacAyeal.

12 Q. -- MacAyeal and Perrenot?

13 A. That's right.

14 Q. In El Paso, Texas?

15 A. That's right.

16 Q. What kind of a law firm was that?  
17 What was their field of expertise, if they  
18 had one?

19 A. Well, that was back in the days  
20 when a five- or six-person firm seemed to be  
21 fairly big for a town like El Paso.

22 Q. Yes.

23 A. It was a general practice. They  
24 represented some corporations and banks and  
25 commercial interests, but they -- one of the

1 partners had an active tort personal injury  
2 practice. We did some estate planning. It  
3 was really a very general practice.

4 Q. Okay. A very general practice  
5 then. And, well, did you handle any  
6 personal injury cases yourself?

7 A. Yes, I did.

8 Q. Okay. Did you handle as lead  
9 counsel any cases sought to be pursued as  
10 class actions?

11 A. No, I can't -- I can't recall.  
12 Again, I'm not sure about my recollection  
13 but I don't recall having been counsel on  
14 any class actions.

15 Q. Okay. Was the firm counsel in any  
16 class actions?

17 A. I think they were counsel in some  
18 class actions, yes.

19 Q. All right. Can you remember the  
20 names of any?

21 A. I can't remember the specifics at  
22 all.

23 Q. Do you recall whether or not you  
24 did any work in connection with any of the  
25 class actions where the firm was counsel?

1           A.       I think it's quite possible that I  
2 might have done some briefing or some  
3 talking to other lawyers involved in it but  
4 I don't recall being actively involved as  
5 co-counsel, for example, or that sort of  
6 thing.

7           Q.       Okay. All right. Now, when would  
8 you say would be the point in time in your  
9 career that you had an interest in class  
10 actions?

11          A.       Well, my first active  
12 participation in class actions, I think,  
13 came in 1967 when I finished my two years in  
14 the Army and I came as a teaching fellow to  
15 Harvard Law School. And at that time I had,  
16 because I had just come from the military, I  
17 had considerable -- I had experience in  
18 military law that not many people had.

19                 And so I was -- requests were made  
20 to me by Legal Services and Civil Liberties  
21 Union and various groups like that, they  
22 heard that I knew something about military  
23 law, and so I became involved in several  
24 essentially First Amendment servicemen's  
25 individual rights cases, some of which were

1 filed as class actions.

2 And during that time I also began  
3 to get involved in other forms of civil  
4 rights cases, during that time heavily First  
5 Amendment cases that were filed as class  
6 actions.

7 Q. All right. Let's see now. This  
8 was, so I have some sense of time, '67 and  
9 you are a teaching fellow at the Harvard Law  
10 School?

11 A. Yes. And I was there for two  
12 years, till '69.

13 Q. All right. And these -- do you  
14 recall how many class actions that you  
15 participated in during that, what, two-year  
16 period, perhaps three?

17 A. It's just a guess. Under five.

18 Q. Okay.

19 A. But I also would sometimes be  
20 called and give advice on certain aspects of  
21 other cases but I was not counsel in them.

22 Q. All right. But in those five  
23 cases, I believe what you've told us is that  
24 they were either First Amendment or racial  
25 discrimination claims; correct?

1           A.       I think that's right. And also  
2 heavily related to military rights during  
3 that time period.

4           Q.       Okay. All right. And you did  
5 that pro bono; right?

6           A.       Yes.

7           Q.       Okay. And why was that?

8           A.       I wanted -- I liked law practice,  
9 I agreed with the positions that were being  
10 presented, and so a combination of wanting  
11 to have my hand in and getting my -- getting  
12 persuaded by these groups to do it.

13          Q.       Sure. And why was it that these  
14 groups were looking for someone to do it pro  
15 bono instead of simply walking down the  
16 street and hiring a law firm to handle that  
17 kind of litigation?

18          A.       Oh, they generally just didn't  
19 have the funding to do it. Civil Liberties  
20 Union relies, of course, on participating  
21 attorneys to do a lot of their litigation.

22          Q.       Right. And I guess you felt that  
23 the issues were so important to public  
24 policy that you felt that it would be  
25 appropriate to do it on a pro bono basis;

1 would that be fair?

2 A. Yes, but I also feel that -- I've  
3 always done pro bono work throughout the  
4 time I've been a lawyer. I'm an active  
5 member of Austin Lawyers Care in which you  
6 agree to take a couple of cases a year pro  
7 bono. I felt that all lawyers have a pro  
8 bono obligation.

9 Q. Perhaps I didn't artfully --  
10 articulate the question. What I meant to  
11 learn was you certainly had to make a  
12 determination of whether or not you thought  
13 the cause was just before taking on that pro  
14 bono work; isn't that true?

15 A. Well, I didn't have any trouble  
16 with the issues, both the substantive issues  
17 and the class certification issues as far as  
18 the class actions. I felt they were fully  
19 warranted under the law.

20 Q. Sure. And you felt the need to  
21 have those issues resolved in some fashion  
22 and, hence, your participation; right?

23 A. I was willing to do that, yes.

24 Q. And you also felt, I would  
25 suppose, that that class action device was

1 warranted as a weapon, if you will, in order  
2 to achieve the goals of the group who sought  
3 your counsel; is that fair?

4 A. I thought that the class action  
5 was appropriate for the remedies that were  
6 being sought, yes.

7 Q. Can you share with us perhaps some  
8 of your analysis with regard to that  
9 determination? In other words, why would  
10 you believe that the class action device  
11 have been appropriate in the context of  
12 racial discrimination or First Amendment  
13 rights? Why not just take one single  
14 plaintiff and file the one single lawsuit  
15 against the entity whose conduct you felt  
16 inappropriate?

17 A. Well, these were (b)(2) class  
18 actions, seeking injunctive relief on behalf  
19 of the class. And that's kind of the para  
20 -- civil rights cases are kind of the  
21 paradigm for a (b)(2). They've always been  
22 recognized as the fact that the class  
23 members are identifiable by discrimination  
24 due to their race or due to their status in  
25 the military or whatever.

1 Q. Right.

2 A. And --

3 Q. And, of course, you don't do a  
4 whole lot of good if you succeed in  
5 injunctive relief in a racial discrimination  
6 claim when you obtain that relief for only  
7 one person; do you?

8 A. Well, of course, part of the  
9 objective when you've got a (b)(2) class,  
10 the very nature of the complaint is that  
11 each class member is being discriminated  
12 against or imposed upon by the conduct  
13 because he's a member of that class. And so  
14 you're talking about a class-wide, rather  
15 tight class-wide linkage between them.

16 Q. Right. And it's also true that in  
17 those instances it's usually the case that  
18 the individual is powerless in the context  
19 of the institution which is, you know,  
20 guilty of this conduct; right?

21 A. Well, most of these involved,  
22 because they were civil rights cases,  
23 involved some sort of government -- state  
24 action. And we all know the problem of  
25 individuals in dealing with governmental



1 agencies and so forth.

2 Q. And those are what?

3 A. Sometimes agencies, for their own  
4 reasons, are not as sensitive to individual  
5 rights as they ought to be.

6 Q. That's because of the size of the  
7 institution perhaps?

8 A. (Witness nods head affirmatively.)

9 Q. Is it also perhaps because of the  
10 power that the institution wields, either  
11 financial or governmental?

12 A. Can be, yes.

13 Q. Can be. Okay. So I guess you  
14 would agree with me then that with regard to  
15 the decision to pursue a claim as a class  
16 action, one would consider the relative  
17 power of the plaintiff versus the  
18 defendant? That would be a consideration?

19 MR. McDERMOTT:

20 For a (b)(2) class or all  
21 classes?

22 EXAMINATION BY MR. BRUNO:

23 Q. All class actions.

24 A. Well, there's a distinction.

25 These were (b)(2) class actions in which

1       you're seeking to remedy class-wide  
2       discrimination or conduct through some kind  
3       of common injunctive relief. Had these been  
4       (b)(3) class actions, there's not quite the  
5       degree of commonality.

6               That's why we have a (b)(3) class  
7       action. We allow it on lesser standards.  
8       You only need to have -- You need to have  
9       combinations predominate, but the issues  
10      need not be identical and so forth.

11      Q.       I see. Are you telling us that  
12      the (b)(3) is not appropriate to a racial  
13      discrimination class action claim?

14      A.       No, it can be. And if (b)(3) is  
15      as broad as in a Title 7 case for damages,  
16      then it then, of course, may be appropriate.

17      Q.       Then I put the question to you  
18      again. The relative power of the plaintiff  
19      versus the defendant would be a relevant  
20      consideration in whether or not to proceed  
21      as a class action; wouldn't that be fair to  
22      say?

23      A.       Let me put it this way. I think  
24      that a court, in considering class action,  
25      has to consider whether a remedy might be

1 available through that class action that is  
2 feasible in order to address the wrong  
3 that's being complained of.

4 Q. Well, in that context, that is,  
5 whether the remedy is available, is a court  
6 empowered to assess the relative size of the  
7 parties, relative power of the parties to  
8 determine the likelihood of success so that  
9 in the individual case, in a racial  
10 discrimination context, can the Court  
11 undertake the determination that one single  
12 black plaintiff is unlikely to prevail  
13 against an institution because of his lack  
14 of power, his lack of resources and the  
15 like, and on that basis consider that the  
16 class action would be an appropriate device  
17 in that context?

18 A. Well, I think -- I think a  
19 court -- we recognize that class litigation  
20 has salutary effects in righting class-wide  
21 discrimination. And to the extent that --  
22 I'm uncomfortable with saying would you  
23 consider power or size, those -- It's really  
24 whether the class action device is going to  
25 enable the Court to provide the kind of

1 remedy that the Court feels is going to be  
2 suitable.

3 Q. Well, you yourself have utilized  
4 the phrase "divide and conquer" in the  
5 context of the choice of a defendant to  
6 proceed with the plaintiffs' class or not to  
7 proceed with the plaintiffs' class; haven't  
8 you?

9 A. Yes.

10 Q. And what did you mean by that?

11 A. Well, I think that was probably  
12 used in the context of the asbestos  
13 litigation. I think that -- And this is a  
14 permissible strategy of defendants, of  
15 course --

16 Q. Sure.

17 A. -- to decide that they will not  
18 settle cases and that they will try each  
19 case individually. I think that a court is  
20 entitled to recognize, particularly in the  
21 asbestos type of situation where there was a  
22 flood of cases and the courts were clogged,  
23 that if the class action device provides a  
24 feasible way to move these cases forward and  
25 avoid the logjam and the possible denial of

1 rights to plaintiffs, that the class action  
2 device should be considered.

3 Q. Well, I'm sorry, though, but I  
4 don't know that I understood in your answer  
5 what you meant when you used the words  
6 "divide and conquer"? What did you have in  
7 your mind when you used those words?

8 A. I'm not -- Do you have the context  
9 in which I said that?

10 Q. Yes, I sure do.

11 A. I don't want to commit myself --

12 Q. So you don't remember it?

13 A. I remember very vaguely the notion  
14 but I can't tell you the context in which --

15 Q. You don't remember the context?

16 A. No, I don't. Do you?

17 Q. Yes. I believe it comes, at least  
18 in one instance, in your article entitled  
19 "Class Actions and Duplicative  
20 Litigation."

21 MR. McDERMOTT:

22 Why don't you show the witness the  
23 passage that you want to ask him about?

24 EXAMINATION BY MR. BRUNO:

25 Q. I'd be pleased to. I'd be pleased

1 to. I just -- It's at Page 512 of the  
2 article.

3 A. If I could look at that.

4 Q. Certainly.

5 A. (Witness reviews document.)

6 Q. It's underlined. Right above the  
7 underline, I should say.

8 A. Yes.

9 Q. Do you have it?

10 A. Yes.

11 Q. Does that refresh your  
12 recollection?

13 A. Yes.

14 Q. All right. What did you mean in  
15 using that phrase, "This factor should not  
16 be read as protecting a defendant's divide  
17 and conquer strategy"? What is the divide  
18 and conquer strategy?

19 A. Well, let me put it in the  
20 context. I was talking about the factor  
21 that is set out in Rule 23. One of the  
22 factors for consideration is the interest of  
23 the class members in individually  
24 prosecuting their cases. And what I  
25 indicated is that simply the defendants'

1 determination that these individual  
2 plaintiffs don't want to go forward short of  
3 a class action is not -- is not going to  
4 necessarily determine the case.

5 One justification for deciding  
6 that their -- that the class action is  
7 appropriate is that this is the most  
8 feasible way for the class members to  
9 litigate the particular matter.

10 Q. I understand that. But my  
11 question is, once again, what is the divide  
12 and conquer strategy?

13 A. I think I was simply referring to  
14 the situation that -- of defendants  
15 attempting to litigate each case  
16 individually and opposing any forms of  
17 consolidation or aggregation of any kind.

18 Q. Okay. Why might a defendant want  
19 to do such a thing?

20 A. Well, it can be a useful legal  
21 strategy.

22 Q. All right.

23 A. Particularly if the defendants are  
24 successful in the cases.

25 Q. And particularly if the litigation

1 is expensive; right?

2 A. There may be advantages in so  
3 doing, yes.

4 Q. All right. So that if litigation  
5 costs the plaintiff a whole lot of money to  
6 pursue individually, it would quite  
7 naturally be a good defense tactic to do  
8 what it could to require the plaintiffs to  
9 file individually and have their suits tried  
10 individually; fair?

11 A. It can be -- It can be such a  
12 strategic decision.

13 Q. Sure.

14 A. Sure.

15 Q. Okay. All right. Now, I believe  
16 next you went to the Indiana University  
17 School of Law where you were a professor?

18 A. Yes.

19 Q. And you were there for  
20 approximately eight years.

21 A. Yes.

22 Q. And while teaching at Indiana  
23 School of Law, you taught civil procedure?

24 A. Yes.

25 Q. All right. As a course --



1 A. Yes.

2 Q. -- title? Okay. Did you teach  
3 the complex litigation course at Indiana?  
4 Did I understand that?

5 A. No. No, I didn't. That really  
6 wasn't developed until I was at Texas.

7 Q. Okay. All right. So your only  
8 teaching of class action would have been,  
9 obviously, as class action relates to the  
10 civil procedure course?

11 A. Well, as it relates to the civil  
12 procedure course but I also taught a number  
13 of courses on -- that involve class  
14 actions. I taught a course on civil rights  
15 remedies that involved class actions, I  
16 think I taught a course on litigation with  
17 the government that involved class actions,  
18 I did a trial advocacy course that had a  
19 problem on class actions and so forth.

20 Q. Certainly, though, you would agree  
21 that your teaching would have been very  
22 peripheral with regard to class actions and  
23 not in depth?

24 A. Well, class actions is a segment  
25 of the first year course in civil

1 procedure. There's a section of the  
2 casebook devoted to that with a number of  
3 cases.

4 Q. Right.

5 A. It was not in depth in the same  
6 way that it would be in a course of complex  
7 litigation, that's right.

8 Q. Okay. All right. And then, let's  
9 see, we have next the American Bar  
10 Foundation Fellowship in Legal History. Was  
11 that an employment or help me understand  
12 what that was.

13 A. Let's see. Is that the -- Is that  
14 19 --

15 Q. 1975 is what you've got indicated  
16 on the vitae. It says "LEGAL AND ACADEMIC  
17 EXPERIENCE," so you may have put them all  
18 together.

19 A. That was a -- I got a summer grant  
20 from the American Bar Foundation to do a  
21 study in Washington, D.C. of some legal  
22 history involving the military, military and  
23 courts-martial. So it was a military  
24 history project, military law history  
25 project, I guess.

1 Q. Okay. All right. And then, of  
2 course, you moved on to the University of  
3 Texas School of Law at Austin. And you are  
4 still there as a full professor?

5 A. Yes.

6 Q. Tenured professor?

7 A. Yes.

8 Q. And it is there that you started,  
9 actually began the course entitled "Complex  
10 Litigation"?

11 A. Yes.

12 Q. All right. And a segment of that  
13 course relates to class action?

14 A. That's right.

15 Q. How many weeks in the semester do  
16 you spend on class actions in that course?

17 A. Well, we have a 14-week semester.  
18 And I guess class action, I spend five, five  
19 or six weeks on it specifically.

20 Q. Okay. All right. And that's the  
21 only course that you teach that really gets  
22 into a substantive -- a discussion of class  
23 action; correct?

24 A. Well, I spend in my first year  
25 procedure course, we have a section on class

1 actions. And I spend, I'm going to guess, a  
2 week or maybe a week and a half on class  
3 actions in first year procedure. A section  
4 of my ADR course deals with complex mass  
5 torts and so forth. And then some of the  
6 ADR aspects, some of which deals with class  
7 actions.

8 Q. So in your civil procedure course,  
9 you would spend, oh, what, three, four  
10 classes on class action?

11 A. Yeah, four or five classes is  
12 probably what it is.

13 Q. All right. And then in your  
14 complex litigation, 14 weeks, it would  
15 probably be what? Oh, about 30, 35 classes?

16 A. No, three classes a week for five  
17 weeks.

18 Q. Fifteen classes?

19 A. Fifteen classes.

20 Q. Fifteen hours?

21 A. Yeah.

22 Q. All right. In ADR you spend how  
23 many weeks on class action?

24 A. Oh, a couple, I guess, in some way  
25 or other.

1 Q. Okay. By the way, would you agree  
2 with me that in this field of alternative  
3 dispute resolution that what is necessary as  
4 a prerequisite is that both parties be  
5 interested in resolving their dispute?

6 A. Certainly voluntary dispute  
7 resolution. Mediation that's entirely  
8 voluntary, whether the parties will agree or  
9 not, requires both parties to have some  
10 willingness to try to resolve it.

11 Q. Would you agree with me that a  
12 divide and conquer strategy would be  
13 somewhat inconsistent with an interest in  
14 alternative dispute resolution?

15 A. Well, one can -- if one is  
16 individually litigating cases, one can  
17 choose to settle those cases. The asbestos,  
18 an awful lot of the asbestos cases were  
19 settled rather than actually tried.

20 Q. Okay. Now, with regard to your  
21 writing on the subject, we have this  
22 casebook, but the casebook really is nothing  
23 more than the reproduction of certain  
24 decisions or opinions that you've selected;  
25 right?

1           A.       Well, the casebook is -- the  
2 context of the casebook is linking together  
3 cases with a lot of notes and questions and  
4 introductory material. And so that they'll  
5 be a suitable teaching vehicle.

6           Q.       All right. So, again, though, the  
7 point is that most of the book consists of  
8 reproductions of opinions and decisions from  
9 cases that you've selected, you and your  
10 partner, that is; right?

11          A.       Yeah, I don't -- I don't know what  
12 the percentage would be. I would guess that  
13 maybe half or even two-thirds of the book  
14 would be the text of cases that have been  
15 edited by us; and the other half or a third  
16 are commentary, notes about related cases,  
17 and how the cases interrelate, and questions  
18 and so forth.

19          MR. BRUNO:

20                 Right. Okay. Well, all right, if  
21 I may, Counsel, one of the exhibits which I  
22 would like to attach -- and I haven't  
23 undertaken the work to reproduce it -- would  
24 be to photocopy the notes that you just  
25 referred to and the questions that appear

1 after each of the sections in the class  
2 action section of the book, which is no more  
3 than about ten pages of materials.

4 And I have the book, if you all  
5 want to look at that, to see what kind of  
6 scope we're talking about.

7 MR. McDERMOTT:

8 Why don't we just use the whole  
9 casebook. We'll furnish a copy at our  
10 expense.

11 MR. BRUNO:

12 Well, we can do that except that  
13 the points that I want to make are in those  
14 limited pages. And I think it would be far  
15 easier for the Court to review the ten pages  
16 as opposed to the 700 pages.

17 MR. McDERMOTT:

18 Why don't we introduce --

19 MR. BRUNO:

20 You can put in the whole book as  
21 well.

22 MR. McDERMOTT:

23 -- the ten pages as "3" and the  
24 whole book as "4."

25 MR. BRUNO:

1                   Excellent idea. You can put in  
2                   the whole book as well. In that regard, I  
3                   would also like to attach the professor's  
4                   article entitled "Class Actions and  
5                   Duplicative Litigation" as -- What number  
6                   are we at?

7                   MR. McDERMOTT:

8                   That would be "5."

9                   EXAMINATION BY MR. BRUNO:

10                  Q.       We'll furnish you with a copy, Ms.  
11                  Reporter, since we've already referenced  
12                  that article.

13                  All right. Let's see now. Other  
14                  writings in the area of class action would  
15                  be the article that I just referred to,  
16                  "Class Actions and Duplicative Litigation";  
17                  correct?

18                  A.       That's right.

19                  Q.       Perhaps if you would, would you  
20                  show me in your vitae the other articles  
21                  that you've written on the subject of class  
22                  certification.

23                  A.       Well, the three I referred to  
24                  earlier are on Page 4 of the "Aggregate  
25                  Disposition of Related Cases" in the Review



1 of Litigation.

2 Q. I'm sorry. You said that so  
3 quickly.

4 A. Sorry. The second listing under  
5 "SELECTED ARTICLES."

6 Q. All right. It says "Aggregate  
7 Disposition of Related Cases: The Policy  
8 Issues" --

9 A. That's right.

10 Q. -- 10 Review of Litigation 231.  
11 That's a set of books, I guess?

12 A. Review of Litigation is a law  
13 journal.

14 Q. Oh, it's a law journal?

15 A. So it's in Volume 10, Page 231.

16 Q. And who publishes that?

17 A. It's published at the University  
18 of Texas.

19 Q. All right.

20 A. The law school.

21 Q. All right. And this is on the  
22 subject of class action?

23 A. It relates to class action. It's  
24 talking about the broader question of using  
25 aggregate devices, in which class action is

1 one of them.

2 Q. All right. And the other article,  
3 the other two articles, I believe --

4 A. Then the other one is the third  
5 one up from the bottom on Page 4, "Class  
6 Actions and Duplicative Litigation," the one  
7 you just referred to.

8 Q. All right. And that's "Exhibit  
9 Number 5." And the third article is?

10 A. The third is the second article on  
11 Page 5.

12 Q. Okay. Which is an article  
13 entitled "Restructuring the Trial Process in  
14 the Age of Complex Litigation," 63 Texas Law  
15 Review 721?

16 A. That's right.

17 Q. Is that on the subject of class  
18 action or is it merely related to the  
19 subject of class action?

20 A. Also related to. This is the one  
21 I said that I particularly dealt with the  
22 two books by Judge Schwarzer and Jeffrey  
23 Hazard about various techniques used to deal  
24 with complex litigation, and they often --  
25 they often were talking about the class

1 action context but not exclusively.

2 Q. Okay. All right. So we have, if  
3 you will, the one article on class action  
4 and the two that are related to class  
5 action; correct?

6 A. That's right.

7 Q. All right. And there are no other  
8 writings that you have published on this  
9 subject; correct?

10 A. I think some of my other articles  
11 may at times refer to class actions in some  
12 of it. The other one that I should refer  
13 you to, though, is the "SELECTED PAPERS AND  
14 PRESENTATIONS" sometimes did deal with class  
15 actions.

16 Q. All right.

17 A. If I can --

18 Q. Please do. And I would like  
19 copies of those as well, if you would be so  
20 kind.

21 A. This is a selected list of papers  
22 I've given and CLEs, so I've kind of  
23 forgotten what I have down here. But if you  
24 look on Page 7, the next-to-the-last item,  
25 "Procedural Innovations in Major

1       Litigation" --

2           Q.       I saw that. May I have a copy of  
3       that? Would you happen to have a  
4       reproduction in your office?

5           A.       You know, I don't know that that  
6       was put in final form. I think I may just  
7       have the notes from which I gave the  
8       presentation. But I'll check it out.

9           Q.       Okay.

10          A.       If I can provide you something, I  
11       will.

12          Q.       This is a description of a talk  
13       that you gave --

14          A.       That's right.

15          Q.       -- to --

16          A.       It's a CLE.

17          Q.       -- to a Bar meeting?

18          A.       That's right. A CLE, that's  
19       right.

20          Q.       Okay. All right. So we've  
21       covered all of your writings and all your  
22       presentations on the subject of class  
23       action; correct?

24          A.       All of the major ones, yes.

25          Q.       Okay. All right. Well, there are

1 no minor articles that we haven't touched  
2 on; right? Just so that I'm clear.

3 A. No. It's just that, for example,  
4 some of my -- some of my writings on  
5 alternative dispute resolution sometimes  
6 deals with class action aspects and so  
7 forth. My interest in complex litigation  
8 and class actions often overlap with some of  
9 these other things that I'm writing about.

10 Q. All right. I just want to  
11 understand. I was listening very carefully  
12 to counsel's questions. I don't know if I  
13 understood this. Do you consider yourself a  
14 pioneer in the field of class action?

15 A. No, I don't know if he used the  
16 term this way. I think it was was I a  
17 pioneer in creating the course of complex  
18 litigation in law schools. No, I don't  
19 consider myself to be a pioneer in class  
20 actions itself.

21 Q. I was just curious. Who would be,  
22 you know, since you've been presented here  
23 as an expert in the field of class action,  
24 can you give me the names of other  
25 professors of law in the country who would

1 be regarded as experts in this field?

2 A. Well, other teachers of complex  
3 litigation who have written about these  
4 kinds of problems, some that come to mind  
5 are Mary Kay Kane at Hastings, Richard  
6 Marcus who's my co-author at Hastings,  
7 Francis McGovern who's at Alabama, Jack  
8 Ratliff who is a colleague of mine at Texas  
9 and his relationship was in serving as a  
10 special master with Judge Parker.

11 Q. Okay. How about Professor  
12 Newberg?

13 A. Are you talking about the Newberg  
14 on class actions?

15 Q. Yes.

16 A. Well, he's not -- he was a  
17 practicing -- he's dead now.

18 Q. Yes, I know.

19 A. But he was not a professor unless  
20 he was an adjunct professor. I don't know  
21 about that.

22 Q. Okay.

23 A. But he was certainly an expert.

24 Q. He was an expert?

25 A. Sure.

1 Q. Would you agree that perhaps he is  
2 the expert or was -- he's no longer with us  
3 -- in the field of class action?

4 A. Well, because it's -- he had the  
5 prominent treatise on it. This multi-volume  
6 work, it was the only thing out there, so it  
7 gets cited a lot and he did a lot of yeoman  
8 work in the area of class actions.

9 Q. Okay. All right. Now, do you  
10 have available for us to look at a list of  
11 all of the materials that you reviewed in  
12 connection with the opinions that you've  
13 offered this morning?

14 A. No, I don't.

15 Q. Okay. All right. So I guess we  
16 have to rely on your memory. Can you tell  
17 me what pleadings you reviewed from this  
18 case?

19 A. Well, if I can remember, I think I  
20 reviewed the original complaint and the  
21 amended complaint or complaints, I can't  
22 remember if there was one or two amended; I  
23 reviewed memoranda from both sides on the  
24 class certification issue, and there were  
25 multiple memoranda, I think, on that; I

1 reviewed some memoranda and maybe motions  
2 involving discovery and the extent of  
3 discovery involving the class action  
4 certification question.

5 Q. Okay.

6 A. I saw the request for  
7 interrogatories and the answers that were  
8 given by both sides. That may be it. Those  
9 are the ones that I remember right now.

10 Q. Okay. All right. Well, I believe  
11 you also make a reference to --

12 A. Oh, the depositions; is that what  
13 you're --

14 Q. Well, no, I was going to ask you  
15 about materials related to cigarette  
16 litigation. I didn't know if that was --

17 A. Those were --

18 Q. That wasn't related to this case  
19 in particular, that was just other  
20 materials?

21 A. Yeah, the -- well, you just asked  
22 me about pleadings, pleadings and court  
23 documents in this case.

24 Q. Okay.

25 A. And that's what I -- But let me



1 add to that I also read portions of, I  
2 think, about -- I can't tell you the exact  
3 number -- six, maybe, depositions. They  
4 were the depositions of the class members, I  
5 believe.

6 Q. Okay.

7 A. And one of the doctor experts.

8 Q. Do you remember which one?

9 A. Can you tell me a name?

10 Q. Brooks Emory or --

11 A. Dr. Emory.

12 Q. All right. So that's the only  
13 medical expert's deposition you've reviewed?

14 A. I think that's right.

15 Q. Okay. All right. And you were,  
16 although not related to this case, given  
17 some information or materials related to the  
18 history of cigarette litigation; is that it?

19 A. Yes. These were, oh, some  
20 magazine articles, newspaper articles,  
21 national law journal articles about what's  
22 been going on in cigarette litigation. And  
23 then a number of Law Reviews, articles about  
24 the Cipollone case; primarily, that was the  
25 most prominent one. But some of the other

1 cigarette litigation. There was a Harvard  
2 Law Review article in Tennessee, a Law  
3 Review article, and several others that I  
4 can't --

5 Q. Okay. Would you explain to me how  
6 that information would be relevant to your  
7 opinion, if indeed it was?

8 A. Well, I don't know how -- it was  
9 relevant simply to give me some background  
10 notion of what's going on in this field of  
11 tobacco litigation. And it couldn't -- it  
12 was not intended for me to be an expert in  
13 tobacco litigation because it was too much  
14 of an overview.

15 Q. Sure. Well, can you tell me  
16 this? What have you learned about the  
17 history of cigarette litigation? What do  
18 you know about it?

19 A. Well, from what I can tell, it's  
20 been going on -- cases against the tobacco  
21 company related to injuries arising out of  
22 smoking goes back to the fifties. There  
23 seem to have been, according to the  
24 articles, there seem to have been a couple  
25 of what are called generations of tobacco

1 cases. And as various theories were raised  
2 and as new information and new medical  
3 evidence was obtained, there seems to have  
4 been an evolution of the theories.

5 As far as I can tell, most of the  
6 commentators seem to say this, the tobacco  
7 companies have been quite successful, both  
8 on -- both on legal issues but perhaps even  
9 more prominently with juries in succeeding  
10 in those cases.

11 Q. Okay. All right. So you know  
12 that, number one, that cigarette litigation  
13 is nothing new; right?

14 A. (Witness nods head affirmatively.)  
15 That's right.

16 Q. Do you know, in fact, how many, if  
17 we can just call them, with permission,  
18 cigarette litigation or cigarette-related  
19 litigation cases have been filed --

20 A. No, I don't.

21 Q. -- since the fifties?

22 A. (Witness shakes head negatively.)

23 Q. Well, do you know -- would you  
24 believe that it's more than ten?

25 A. I would assume it is, yes.

1 Q. Hundreds?

2 A. I would guess but I don't know.

3 Q. All right. Well, would you agree  
4 with me that there is some value in  
5 reviewing those cases, particularly in the  
6 context of your comments about superiority?

7 A. (Witness nods head affirmatively.)  
8 Yes, I think some, some review of what's  
9 been done in the past is useful, sure.

10 Q. All right. Because perhaps we can  
11 see trends of defense; right?

12 A. Uh-huh (indicating affirmatively).

13 Q. Like in the asbestos litigation?

14 A. (Witness nods head affirmatively.)  
15 Uh-huh (indicating affirmatively).

16 Q. Correct?

17 A. (Witness nods head affirmatively.)

18 Q. And we also learn a little bit  
19 about the tactics as well; correct?

20 A. Yes.

21 Q. Okay. And, in fact, what we learn  
22 in a review of the history of cigarette  
23 litigation is, one, that the plaintiffs have  
24 never won; correct? They haven't been paid  
25 a dollar; right?

1           A.       I think that's correct, yes.

2           Q.       Okay. Have never won. Two, that  
3 the tobacco industry spares absolutely no  
4 expense in the defense of litigation;  
5 correct?

6           MR. McDERMOTT:

7                   I object. I'm not sure you've  
8 laid a foundation for that.

9           EXAMINATION BY MR. BRUNO:

10          Q.       If I did, I did. Go ahead.

11          A.       I can't -- I can't judge what  
12 decisions they have made in allotting a  
13 budget to this or not. You know, as far as  
14 I can tell, they have vigorously defended  
15 the cases. As to whether they have spared  
16 no expense, I don't know.

17          Q.       All right. Perhaps the use of the  
18 phrase was a bit overdone, but the truth is  
19 that you know from your understanding of the  
20 history of cigarette litigation that, in  
21 your words, the cigarette manufacturers have  
22 vigorously defended their product; correct?

23          A.       As far as I can tell, their  
24 position has been that they do not believe  
25 there's liability and that they've defended

1 those cases.

2 Q. All right. And in many instances,  
3 plaintiffs have actually dropped the  
4 litigation because it's just too expensive;  
5 correct?

6 A. I don't have personal knowledge of  
7 that but I'll accept your statement on  
8 that. I suppose that's probably happened.  
9 I just don't have any personal knowledge of  
10 it.

11 Q. You did read a little bit about  
12 the Cipollone case; correct?

13 A. Yes.

14 Q. And you do know that the plaintiff  
15 counsel attempted to withdraw; don't you?

16 A. After the -- After it was  
17 remanded.

18 Q. Right.

19 A. Yeah. What I don't know is  
20 whether that was because of it became too  
21 expensive or because there were other  
22 problems with the case.

23 Q. Okay. Well, do we agree at least  
24 then that cigarette litigation is very, very  
25 expensive for the plaintiff? "Yes" or

1 "No"? If you don't, it's fine. I won't  
2 hold it against you. I just want to know  
3 your view. Is it or is it not?

4 A. I suppose it can be. I really  
5 don't know enough about all these individual  
6 cases as to how much discovery was done and  
7 how short the trials were. And I really  
8 can't tell you where it fits on the scope of  
9 expensive litigation.

10 I do know that most, most product  
11 liability and mass tort cases involve enough  
12 complex issues and discovery that it's not  
13 like a routine fender bender automobile  
14 accident case, for example, or something.

15 Q. And the cigarette product  
16 liability cases is certainly not like the  
17 usual product liability case in that, as  
18 you've pointed out, the tobacco companies  
19 have taken the position that they're not  
20 going to pay a dime; right?

21 A. (Witness nods head affirmatively.)

22 Q. They're going to defend their  
23 product to the end; correct?

24 A. Yeah, I think that's their  
25 position. There may be other product

1 liability cases where manufacturers have  
2 taken the same position, but that seems to  
3 be their position.

4 Q. All right. And as you've already  
5 told me, these facts are relevant to the  
6 discussion of the superiority of a class  
7 action versus individual suits; correct?

8 A. I think it's relevant, yes.

9 MR. BRUNO:

10 Yes. Okay. All right. We've  
11 already gone to 12:30. I'm fine to keep  
12 going. Just so you'll know, it's 12:30.  
13 You want to break?

14 MR. McDERMOTT:

15 Why don't you pick a convenient  
16 spot for you to stop.

17 MR. BRUNO:

18 Let's just break. Why don't we  
19 just do it. It doesn't matter to me.

20 MR. BROWN:

21 Leaving the record at 12:34:16.

22 (Whereupon a lunch recess was  
23 taken at this time.)

24 MR. BROWN:

25 We're back on the record at



1 1:22:34.

2 EXAMINATION BY MR. BRUNO:

3 Q. Okay. Ed, there's a few things  
4 that I forgot that I'd like to kind of  
5 regroup on, if you don't mind. I had asked  
6 you about, you know, your involvement with  
7 class action when you were employed at the  
8 law firm in El Paso and I neglected to ask  
9 you about the other class actions that you  
10 may have had some involvement in after that  
11 time.

12 Can you tell me whether or not you  
13 can recall any cases, any class action cases  
14 in which you were involved that are  
15 published, have been reported?

16 MR. McDERMOTT:

17 Do you mean as counsel or  
18 consultant or simply as counsel?

19 EXAMINATION BY MR. BRUNO:

20 Q. We can divide it up. As counsel  
21 and then in which you were involved.

22 A. I think the answer is "No" to both  
23 of those. In some -- well, the answer is in  
24 counsel, I don't think there were any  
25 published opinions. In some of the cases in

1       which I've consulted, there may have been  
2       but I was not the lead counsel and I was --  
3       often talked to counsel or a judge, for  
4       example, about some aspect of the case. So  
5       I'm just not sure about that. But I can't  
6       identify anything right offhand.

7             Q.       I'm sorry. When you said you  
8       talked to the judge, were you consulted by  
9       the court as an independent --

10            A.       Yeah.

11            Q.       -- expert in the field?

12            A.       Judges who in these cases were  
13       judges who knew me and knew that I knew  
14       something about it and wanted, just wanted  
15       to discuss some legal aspect --

16            Q.       Oh, I see.

17            A.       -- with me.

18            Q.       It wasn't in any formalized  
19       appointment by the Court where the Court  
20       advised both parties he was doing this?  
21       This is just informal discussions with  
22       judges?

23            A.       Exactly.

24            Q.       Can you recall the names of any  
25       cases wherein you were counsel or where you

1 were a consultant in any class action case?

2 MR. McDERMOTT:

3 Is that the whole question or were  
4 you asking about published opinions?

5 EXAMINATION BY MR. BRUNO:

6 Q. No, no, we talked about the  
7 published opinions. Now, any case at all  
8 that he can possibly remember, published or  
9 not, case name and jurisdiction.

10 A. This is a case in which I was  
11 actually an expert witness in a class  
12 certification case in a Texas court. The  
13 name of the case was Carter Wind Turbine  
14 Company was the defendant. And I can't now  
15 remember the name of the plaintiffs in it.  
16 And it was a class action case involving  
17 liability warranty policy. And I testified  
18 on behalf of the defendants who were seeking  
19 to certify a plaintiffs' class.

20 Q. All right. Do you recall which  
21 county?

22 A. It was Wichita Falls, Texas.

23 Q. Okay. All right. Any other case  
24 names that you can share with us this  
25 morning or this afternoon?

1           A.       I really can't remember other  
2 names of other cases right offhand.

3           Q.       Okay. You did mention a  
4 securities fraud case, I think --

5           A.       (Witness nods head affirmatively.)

6           Q.       -- that certified, that was a  
7 common law security fraud, I thought you  
8 said.

9           A.       Yeah, I can give you the name of  
10 that.

11          Q.       All right.

12          A.       That's -- Now, that was not a  
13 class action. It was a consolidated suit.  
14 And the suit was Harrell was the plaintiff,  
15 and right now I can't remember the  
16 defendant, but it was in U. S. District  
17 Court in the Western District of Texas,  
18 Austin Division.

19          Q.       I'm sorry. And Harrell was the  
20 plaintiff or the defendant?

21          A.       Harrell was the plaintiff.

22          Q.       And for whom did you consult? The  
23 plaintiff or the defendant?

24          A.       I was actually co-counsel in that  
25 case, not lead counsel, on various

1 procedural issues.

2 Q. Okay. For?

3 A. For the plaintiff.

4 Q. Okay.

5 A. And that case was consolidated.

6 It was a case in which our client had  
7 purchased tax shelters that went belly up,  
8 and he alleged securities fraud and RICO  
9 violations, and it was consolidated with a  
10 larger class of doctors from Colorado who  
11 had purchased the same -- the same tax  
12 shelters and also had similar claims.

13 Q. How was the conflict of issue  
14 handled in that case?

15 A. I think, if I'm not mistaken, the  
16 tax shelter was a New York tax shelter and  
17 everyone agreed that New York law applied.  
18 And so single law applied.

19 Q. I see. Is it possible then in the  
20 context of a class action for the parties to  
21 agree as to what law would apply?

22 A. It's possible if agreement is  
23 achievable. Just, I suppose, as a  
24 settlement is agreeable by essentially  
25 setting aside the strict rules.

1 Q. Okay. Now, we, I think, were on  
2 the subject of the history of cigarette  
3 litigation. We talked about the success of  
4 the tobacco industry and their -- Would you  
5 agree with me that the tobacco industry, by  
6 the way, has used this, what you call,  
7 divide and conquer strategy in the past?

8 A. I don't -- I don't really know  
9 what motivated them and I don't know that --  
10 We've talked before about the fact that, as  
11 I understand, the tobacco industry's  
12 position is that they believe that there's  
13 no liability and that they will litigate all  
14 cases because they believe there's no  
15 liability.

16 I don't -- I don't know that  
17 that's a divide and conquer strategy. That  
18 seems to me a legitimate position to take  
19 for a defendant, if that's their position.  
20 Or at least it's their right to take it.

21 Q. I didn't ask you if it was  
22 legitimate. What I wanted to know is if you  
23 had an opinion or if you knew, "Yes" or  
24 "No," whether the tobacco industry over the  
25 course of litigation since the early fifties

1 or late fifties has, in fact, adopted the  
2 divide and conquer strategy? And if you  
3 don't know, that's fine.

4 A. I don't know. I have not heard  
5 that term applied to their strategy, but --  
6 and I'm not sure that litigating every case  
7 is divide and conquer necessarily. One  
8 would have to know what the motivation was  
9 and the manner in which they carried it out.

10 Q. Well, as retained expert by the  
11 defense, have you had any discussion with  
12 them about their position on that subject?

13 A. No. Essentially, all I've heard  
14 from them is what I've picked up from other  
15 things that I read. And that is the tobacco  
16 industry's position is that there is no  
17 liability and that they will litigate all  
18 such cases.

19 Q. Now, have you also learned  
20 anything about issues or recurrent issues  
21 that seem to appear in each of these past  
22 cigarette cases?

23 MR. McDERMOTT:

24 I'm sorry. Did you say "current"  
25 or "recurrent"?

1 MR. BRUNO:

2 "Recurrent."

3 MR. McDERMOTT:

4 Sorry.

5 A. In a very general fashion, I  
6 gather that cases have been brought under  
7 the general rubric of causes of action, that  
8 is, negligence, strict liability, breach of  
9 warranty. I'm not -- It seems to me from  
10 what I've heard that the theory of this  
11 case, which also embodies those theories but  
12 is particularly pegged on the concept of  
13 nicotine dependence and emotional harm  
14 arising from that, had not previously --  
15 that particular twist had not previously  
16 been raised. But I'm not an expert on what  
17 has been raised in prior litigation. That  
18 was my impression.

19 EXAMINATION BY MR. BRUNO:

20 Q. Well, whether you're an expert or  
21 not, you have testified today that one of  
22 the things that is relevant to the  
23 consideration of the superiority of class  
24 action is to see whether the history of  
25 litigation in a particular field has



1 revealed any recurrent issues; true or  
2 false?

3 A. That's right.

4 Q. Okay. And have you undertaken  
5 such a study of tobacco litigation?

6 A. What I do know is that it appears  
7 that there are a number of novel issues in  
8 this particular case that, as far as I can  
9 tell, have not been resolved. We're talking  
10 about various kinds of apparently  
11 presumptions arising from certain kinds of  
12 tobacco use, presumptions of addiction, and  
13 I think the term is used in the Answers to  
14 Interrogatories, a presumption of harm  
15 arising from addiction alone.

16 And so far as I know, those issues  
17 have not -- those are novel issues that have  
18 not previously been litigated.

19 MR. BRUNO:

20 With all due respect, I don't  
21 think that's responsive to my question. May  
22 we, Ms. Reporter, read my question back to  
23 the witness.

24 (Whereupon the preceding question  
25 was read back by the court reporter.)

1 THE WITNESS:

2 As I testified earlier, my  
3 knowledge of the history of tobacco  
4 litigation is an overview. I know, in  
5 general, the kinds of issues that have been  
6 raised. I haven't studied the pleadings in  
7 every case by any means. And so my overview  
8 is that a number of the issues have been  
9 litigated in rather different contexts in  
10 the past.

11 EXAMINATION BY MR. BRUNO:

12 Q. Would you agree with me, Ed, based  
13 upon the testimony that you gave us today,  
14 that a study of previous cigarette  
15 litigation should be undertaken to determine  
16 whether or not there are any recurrent  
17 issues?

18 A. If what you're -- If what you're  
19 asking me is would a judge who is deciding  
20 what the relevance of the past litigation  
21 experience is, should a -- would it be  
22 relevant for the judge and the parties to  
23 talk about which issues are novel and which  
24 ones are not, I certainly agree with you. I  
25 think that's relevant. And --

1           Q.       I don't know. Maybe I wasn't  
2       paying very close attention, so just, if I  
3       may, bear with me and see if I have  
4       misunderstood your testimony. But I thought  
5       that what you said this morning was that in  
6       the context of superiority, you really  
7       should litigate a few cases first and, in  
8       particular, you suggested litigating the  
9       individual claims of the four proposed class  
10      representatives so that one could determine  
11      whether or not there were any recurrent  
12      issues. Did you say that?

13           A.       I don't think I put it quite that  
14      way. I said that the asbestos -- that what  
15      Judge Parker was confronted with in the  
16      asbestos litigation was a determination as  
17      to whether to use a class action at a point  
18      in time in which there had been years and  
19      years of asbestos litigation; that that  
20      litigation had informed the Court of lots  
21      and lots of things, informed the Courts of  
22      issues of fact and law. It also informed  
23      the Court as to how long these cases took,  
24      what the expert testimony was, which issues  
25      took three days and which issues took one

1 day and which issues took a week.

2 That all of that experience for a  
3 judge -- gives a judge a pretty good  
4 indication, as it did Judge Parker at that  
5 time, that there were economies and  
6 efficiencies to be achieved by class  
7 actions.

8 One of the issues -- One of the  
9 multiple things that that experience would  
10 give have to do with issues. And if there  
11 are novel issues, as I think there are, but  
12 this is from an overview, if there are novel  
13 issues, as I believe there are in this case,  
14 some of those issues may be decided on  
15 Summary Judgment, some under directed  
16 verdict, some may be decided on appeal.

17 And a court contemplating a  
18 mammoth class action might like to have some  
19 of that background behind it, including some  
20 of the practicalities of what this  
21 litigation entails and how it goes.

22 Q. All right. That being the case,  
23 we know, do we not, that cigarette  
24 litigation predates asbestos litigation;  
25 isn't that true?

1           A.       I don't know when asbestos  
2 litigation began but I'll accept your --

3           Q.       All right. Well, if I tell you  
4 that -- You've told me that cigarette  
5 litigation goes at least to the fifties.  
6 The asbestos litigation started in the  
7 sixties.

8           A.       Okay.

9           Q.       Just accept that, if you will.

10          A.       (Witness nods head affirmatively.)

11          Q.       You've also agreed with me that  
12 there are a number of previous cases  
13 regarding the alleged liability of the  
14 manufacturers of cigarettes; correct?

15          A.       Yes.

16          Q.       All right. And you've also agreed  
17 with me that it is a worthwhile undertaking  
18 for a court, particularly this court, to go  
19 back and review those cases to determine  
20 whether or not there are any recurrent  
21 issues; correct?

22          A.       Among other things, recurrent  
23 issues, yes.

24          Q.       All right. Now, in fact, isn't it  
25 true that one of the -- the biggest, if you

1 will, or the most recurrent issue in  
2 cigarette litigation is the defense of  
3 assumption of risk?

4 A. That seems to have been a  
5 recurrent issue, yes.

6 Q. Okay. All right.

7 A. And, to my knowledge, these --  
8 that issue has been consistently won by the  
9 defense, which should give a court pause as  
10 to whether a court wants to embark on a  
11 class action where all of these theories  
12 have been unsuccessful previously.

13 Q. Well, that's interesting because  
14 what you've told me is that the cigarette  
15 companies vigorously defend their product on  
16 the ground that there's no liability;  
17 correct?

18 A. That's right.

19 Q. Therefore, there can be no risk to  
20 the use of the product if there's no  
21 liability; correct?

22 A. Well, by liability, I assume that  
23 their position is -- It's a whole broad  
24 spectrum of things. I assume, without  
25 really knowing, that they take a position

1 that it is not defective and other aspects  
2 regarding the product itself; but I assume  
3 that they also believe that people who  
4 voluntarily use it, and that there's an  
5 assumption of risk or a comparative  
6 negligence quality to it. I assume that  
7 that's their position on a wide range of the  
8 entire issues.

9 Q. Okay. Well, with regard to both  
10 the assumption of the risk and comparative  
11 negligence, you would agree with me that  
12 there is no defense of misuse of the product  
13 in this litigation; correct?

14 A. I assume that's correct, that it's  
15 expected that the product would be smoked.  
16 Is that what you're saying?

17 Q. Right.

18 A. And in terms of misuse under  
19 product liability, I assume that's so.

20 Q. Okay. So you would agree with me  
21 that what is common in cigarette litigation  
22 and, indeed, in this litigation is that the  
23 product is used precisely as intended by the  
24 manufacturer; right?

25 A. I would guess that. I don't want

1 to speak for what the position of the  
2 tobacco companies have been because I don't  
3 know what they've been on this. But that's  
4 what it strikes me and what I know about the  
5 positions.

6 MR. McDERMOTT:

7 Let me object. I'm perfectly  
8 happy to have you cross-examine Professor  
9 Sherman in any way you want. I would point  
10 out that the scope of his engagement is  
11 considerably narrower than the areas on  
12 which you are examining him now. And you  
13 can assume, and he can assume and that's all  
14 fine. But it does seem to me to be  
15 something of a bootless errand.

16 EXAMINATION BY MR. BRUNO:

17 Q. That may be your view. I  
18 respectfully disagree.

19 In any case, Ed, you've indicated  
20 that they've been highly successful with  
21 regard to this assumption of risk defense.  
22 I'm wondering, sir, what is the risk of  
23 cigarette smoking, if you know?

24 A. What is the risk that --

25 Q. Yes.



1 A. -- that a smoker assumes?

2 Q. Yes. What is the risk?

3 MR. McDERMOTT:

4 Objection. Foundation. Are you  
5 asking as a legal matter or as a scientific  
6 matter?

7 MR. BRUNO:

8 I'm asking his view.

9 MR. McDERMOTT:

10 His view of what?

11 MR. BRUNO:

12 The question. You want me to read  
13 it back to you?

14 MR. McDERMOTT:

15 Please.

16 MR. BRUNO:

17 Would you read back the question.

18 (Whereupon the preceding question  
19 was read back by the court reporter.)

20 EXAMINATION BY MR. BRUNO:

21 Q. That's it. Do you need any more  
22 clarification of that, Ed?

23 A. Well, I'm not sure whether you're  
24 asking me as a legal matter because you want  
25 to know what the black letter law is. Is

1       that what you're asking?

2           Q.       No, sir. I want to know what the  
3       risk of cigarette smoking is. You have just  
4       told us that the cigarette industry has for  
5       years been successful with the assumption of  
6       risk defense. That would imply that the  
7       knowledge of the risk is widely apparent.  
8       And I'm just curious, what is your  
9       appreciation --

10       A.       Okay.

11       Q.       -- of the risk of cigarette  
12       smoking?

13       A.       Okay. I can't speak for the  
14       tobacco industry --

15       Q.       I'm not suggesting that you are  
16       and don't mean to imply that.

17       A.       -- in their prior litigation but  
18       from what I know about it, it seems to me  
19       that the point is that warnings have been  
20       on -- warnings of health conditions have  
21       been on the packs going back to the sixties;  
22       that there is general knowledge that tobacco  
23       causes certain tobacco-related diseases;  
24       that there is general knowledge that  
25       nicotine is addictive and tobacco can, under

1 certain circumstances, create a continued  
2 desire to smoke; and that one smokes given  
3 that kind of information that's generally  
4 known, that one does so recognizing what the  
5 risks are.

6 Q. All right. Well, are those risks  
7 attendant to my smoking -- I've never  
8 smoked. If I smoke one cigarette, am I  
9 encountering those risks that you just  
10 described? As I understand what you've just  
11 said.

12 A. Well, one recognizes that there  
13 has to be some kind of level probably of  
14 consumption at which both the tobacco-  
15 related health risks and possibly the desire  
16 to continue smoking continues. That's one  
17 of the difficult matters, as to where that  
18 threshold is, I suppose.

19 Q. Right.

20 MR. McDERMOTT:

21 Let me interject here.

22 MR. BRUNO:

23 Sure.

24 MR. McDERMOTT:

25 I don't want to interrupt your

1 questioning. I am perfectly prepared to  
2 have you go into all of these areas.

3 MR. BRUNO:

4 Then don't.

5 MR. McDERMOTT:

6 But I would point out for the  
7 record Professor Sherman is a law  
8 professor. I don't know whether he's a  
9 smoker. Actually, I think I do. He's not a  
10 smoker now. I'm not sure there's any  
11 foundation for this. I don't know what the  
12 basis or purpose of this testimony is. It  
13 does not relate to his area of expertise,  
14 however.

15 EXAMINATION BY MR. BRUNO:

16 Q. All right. Now, you said that  
17 this risk is related to the level of  
18 consumption, at least in your view; correct?

19 A. In my view, yes. I --

20 Q. But you don't know what the level  
21 of consumption is?

22 A. That's right. And from what one  
23 can learn from the DSMs and other evidence,  
24 it appears to vary considerably from  
25 individual to individual.

1 Q. Now, would it be reasonable to  
2 determine on a class-wide basis what is the  
3 level of consumption that would pose these  
4 health risks, addiction and the like that  
5 you've just outlined to me, so that one  
6 could determine whether or not the  
7 assumption of risk defense is even available  
8 to the defendants?

9 A. I think my last comment addresses  
10 this when I said it varies considerably from  
11 individual to individual. I don't know of a  
12 bright line rule. I can't define that from  
13 the DSMs or from the 1988 Surgeon General's  
14 report that we can come up with a bright  
15 line rule that applies to 50 million smokers  
16 that will tell us that after one hundred  
17 cigarettes or 20 days or whatever, the  
18 individual is now addicted. It seems to me  
19 that the criteria that the medical experts  
20 suggest are much more subjective and more  
21 diagnostic and individual than that.

22 So it's a little like finding a  
23 question of generic causation. I'm not sure  
24 of the utility that would have in resolving  
25 this litigation involving individual class

1 members.

2 Q. Sure. Well, I understand it's  
3 your opinion that it varies considerably.  
4 But just for the sake of understanding the  
5 implication of the class action, let's  
6 assume for the moment that I say that it  
7 doesn't vary, you say that it does. And  
8 we'll both present evidence on that subject  
9 and some finder of fact will determine the  
10 level varies or maybe they'll find the level  
11 does not vary, okay?

12 Now, assuming that to be true, are  
13 you telling me that there is no benefit to  
14 be derived in having a determination of the  
15 level of consumption necessary to create  
16 risk with regard to your acknowledged  
17 realization that assumption of the risk has  
18 been the defense offered by the cigarette  
19 industry for as long as there has been  
20 cigarette litigation?

21 MR. McDERMOTT:

22 That has not been his testimony  
23 that it was the defense. It was a defense.

24 EXAMINATION BY MR. BRUNO:

25 Q. Rephrase. A defense, okay?

1           A.       Let me start by discussing the  
2 assumption, then I will go on and answer  
3 it.

4           Q.       All right.

5           A.       The assumption seems to me  
6 contrary to what I know. The DSMs and the  
7 1988 Surgeon General's report provide no  
8 such bright line test that is applicable  
9 across the board. Indeed, looking at some  
10 of the depositions of the representative  
11 plaintiffs here, it seems to me the  
12 individual variation is very great.

13                   We have the woman who smoked for a  
14 long time, stopped smoking over a period of  
15 six years, then chose to smoke again because  
16 her boyfriend smoked and she didn't like  
17 kissing him and smelling his tobacco  
18 breath. That seems to me to be -- to  
19 indicate the very individualized nature of  
20 addiction and the individualized nature of  
21 why people go back to smoking for reasons  
22 other than addiction.

23                   It seems to me that we are dealing  
24 with a very individual kind of question  
25 here. And for me to assume that there is an

1 across-the-board test when I've seen no  
2 medical or legal evidence of it would make  
3 my answer, it seems to me, very, very  
4 useless.

5 If there is absolute medical  
6 certainty that every -- all 50 million  
7 smokers upon smoking the hundredth cigarette  
8 or whatever can now be diagnosed without  
9 individualized criteria as addicted, then,  
10 yes, I guess maybe there would be some  
11 utility in a class-wide issue on this  
12 matter.

13 Q. Well, you made me a promise this  
14 morning, I think, you promised that you  
15 wouldn't be the judge; didn't you?

16 A. Well, I'm not --

17 Q. Didn't you promise that you would  
18 not be the judge in the course of this  
19 deposition?

20 A. I don't know what you're referring  
21 to. I'm not the judge. The judge has to  
22 make these decisions, of course.

23 Q. I would ask you then not to make  
24 your own independent determination on  
25 whether or not you can or cannot determine



1        what the level of consumption is to create  
2        risk. And I ask you to please do that in  
3        the context of answering my question.

4            A.        Well, I can't suspend ordinary  
5        reason.

6            MR. McDERMOTT:

7                      Let me interrupt here. You asked  
8        him a question and he answered it. If that  
9        provokes other questions, go ahead and ask  
10       them, but don't badger the witness.

11       EXAMINATION BY MR. BRUNO:

12            Q.        No, he did not answer the  
13       question. And I wanted the record to be  
14       clear that in direct examination, you said  
15       you were not here to be the judge --

16            MR. McDERMOTT:

17                      I don't believe that --

18       EXAMINATION BY MR. BRUNO:

19            Q.        -- you were here to offer your own  
20       thoughts about the procedural device of  
21       class action. Now you're telling me that  
22       you have to suspend your beliefs in order to  
23       answer the question. Now, --

24            A.        I didn't say beliefs. I said  
25       reasons.

1 Q. Suspend your reason.

2 MR. McDERMOTT:

3 I'm not sure that translates into  
4 arrogating himself the power of the judge.  
5 I don't think there's anything in his answer  
6 that says, "Well, I am the judge," so --

7 MR. BRUNO:

8 I think there is a lot in his  
9 answer that says "I am the judge" when he  
10 testifies that he is aware enough of the  
11 medical and scientific evidence that he can  
12 say that you can't determine, as a matter of  
13 fact, what the level of consumption is to  
14 create risk in cigarette smoking.

15 MR. McDERMOTT:

16 You asked for his views and he  
17 gave you his views. If you don't like his  
18 views, don't ask for them.

19 EXAMINATION BY MR. BRUNO:

20 Q. Counselor, I didn't ask for his  
21 views about the level of consumption. I  
22 asked for his views about the legal  
23 implications of this assumption.

24 And that is that you could  
25 determine, based upon competent evidence,

1        what the level of consumption would be to  
2        create risk in cigarette smoking. I ask you  
3        to assume that.

4                MR. McDERMOTT:

5                Why don't, if you've got a  
6        question, why don't you ask it and let's see  
7        where we go from here.

8                EXAMINATION BY MR. BRUNO:

9                Q.        Oh, I did ask the question. It  
10       just wasn't answered. But I'll ask it  
11       again.

12               Ed, if you assume that I have  
13       evidence with regard to the level of  
14       consumption necessary to create risk and the  
15       defendants have evidence to the contrary,  
16       all right, you can find out one way or the  
17       other, it may be that the jury determines,  
18       ah, gosh, it varies with every person on the  
19       planet; it may be, however, that a  
20       determination could be made that there is a  
21       certain level.

22               My question to you, sir, is isn't  
23       it true that that's one of the issues that  
24       is susceptible to class-wide determination?

25               A.        Okay. And my answer is exactly as

1 it was a moment ago. Let me make three  
2 points: Number one, I've seen nothing to  
3 suggest that that is a realistic  
4 assumption. If, indeed, there is conclusive  
5 evidence that as to all 50 million smokers  
6 there is a bright line test at which one can  
7 say that every one of those class members is  
8 addicted, then I think that there may be  
9 some utility in having a class-wide trial on  
10 that particular issue.

11 Q. Now, what are your own views on  
12 smoking? Do you smoke?

13 A. No, I don't.

14 Q. Have you ever smoked?

15 A. When I was a teenager, a little  
16 bit. But I've never smoked very regularly.

17 Q. Do you believe that cigarettes are  
18 addicting?

19 A. I believe, as a personal matter,  
20 that people who smoke tend to like to smoke  
21 more for a variety of reasons. They like  
22 the pleasure, they like the taste and they  
23 want to return to it. Whether that's a  
24 classic case of addiction like heroin or  
25 alcohol, I'm not at all clear of.

1                   It seems to me -- The DSMs, in  
2 fact, suggest that it's as much behavioral  
3 as it is physiological. But all I can do is  
4 refer to the DSMs and the Surgeon General's  
5 report that indicate that there are certain  
6 kinds of criteria that seem to suggest that  
7 there is a desire to continue smoking.

8           Q.       Now, in analyzing this case, have  
9 you analyzed -- and I'm making a distinction  
10 here between whether or not the pleadings  
11 are what you're criticizing or whether or  
12 not it's the claims that you're  
13 criticizing. Do you understand the  
14 distinction I'm making?

15          A.       Well, I'm not sure. If you would  
16 give me an example.

17          Q.       In other words, are you giving  
18 your opinion based upon the way this case  
19 was pled as opposed to how it could be pled  
20 or are you looking at the nature of the  
21 claims made in offering your opinion this  
22 morning?

23          A.       Well, I think I've considered both  
24 of them --

25          Q.       Okay.

1           A.       -- in what I'm talking about. In  
2 attempting to determine what the definition  
3 of the class is and the scope of some of the  
4 problems, I've referred to the pleadings. I  
5 think they're relevant. Also, I've  
6 attempted to determine what the underlying  
7 claims are. It doesn't seem to me to be  
8 purely a pleading problem, although I think  
9 there are pleading problems.

10                   The class definition, the sort of  
11 thing in going through and talking about  
12 things like including in the class people in  
13 the possessions and territories and  
14 relatives and significant others, it seems  
15 to me those are particularly pleading  
16 problems that exacerbate the definitional  
17 problem.

18                   And I suppose that one -- that an  
19 amendment of the pleadings, that at least in  
20 some of those situations, might cure some of  
21 those problems. But I think there are also  
22 a lot of underlying problems here --

23           Q.       Okay.

24           A.       -- regarding the individuation of  
25 various issues that can't be solved by

1 pleading problems.

2 Q. Okay. That's exactly why I wanted  
3 to make that distinction. The pleading  
4 problems can be fixed but the underlying, I  
5 guess as you refer to them, substantive  
6 problems, you believe, can't be fixed?

7 A. Yes, that's right.

8 Q. There are certain problems in this  
9 case that just can't be fixed; right?

10 A. That's right. As it appears to  
11 me. And I want to point out that, one, it's  
12 important to ask what can a creative judge  
13 do in attempting to ask whether they can be  
14 resolved in some fashion.

15 But the high number of individual  
16 issues on which the defendants are going to  
17 be entitled to put in individual evidence  
18 and cross-examine seem to me simply to  
19 foreclose the possibility that you can have  
20 a Phase 1 class-wide trial on a few issues  
21 and then turn it all over to a  
22 questionnaire. I don't think that's  
23 feasible.

24 Q. Okay. Now, you would agree with  
25 me that Rule 23 is a problem-solving device;

1 wouldn't you?

2 A. You mean it encourages the judge  
3 in making a certification decision to --

4 Q. No. I mean that its existence is  
5 based upon a problem that was perceived with  
6 regard to duplicative litigation, among  
7 other things, and the rule was invented to  
8 deal with whatever the perceived problems  
9 were; right?

10 A. Yeah. I would use the word  
11 "problems" instead of single problem.  
12 Class actions, of course, weren't created  
13 new. They were in the Federal Rules of  
14 1938, they have a history in earlier  
15 litigation going back a hundred years. And  
16 so there's some historical reasons why they  
17 developed as they did.

18 But it addresses a number of  
19 situations that can -- that are -- that the  
20 device is aimed at furthering litigation and  
21 getting around those problems.

22 Q. Right. And, in fact, the class  
23 action device has evolved over the years;  
24 hasn't it?

25 A. Yes, it has.



1 Q. In fact, you even cite in your  
2 affidavit that in 1964 it wasn't  
3 contemplated that the device could ever be  
4 used in the mass tort context; correct?

5 MR. McDERMOTT:

6 I believe it's '66.

7 EXAMINATION BY MR. BRUNO:

8 Q. I'm sorry, '66.

9 A. Yeah, the advisory committee notes  
10 sound rather absolute at that time and I  
11 think courts have learned that certain kinds  
12 of mass torts can be resolved by the class.

13 Q. As the cigarette manufacturers  
14 would say, "We've come a long way, baby";  
15 haven't we? All right. So that the class  
16 action procedural device has evolved to the  
17 point where today it is, in fact, being  
18 utilized in mass tort contexts; correct?

19 A. It is being utilized in mass tort  
20 context, given the continuum that I've  
21 already discussed.

22 Q. Sure.

23 A. I think that there are cases that  
24 it's a suitable device.

25 Q. All right. And, of course, in a

1 mass tort context, the given is that every  
2 single plaintiff has potentially different  
3 damages?

4 A. Yes. It's generally recognized  
5 that the damage issues are individual except  
6 that one of the aspects that make it  
7 particularly suitable is when you can come  
8 up with a common device for determining  
9 damages, like a class-wide formula as in the  
10 Corrugated Container case.

11 Q. And that takes a little  
12 creativity; doesn't it?

13 A. It takes a little creativity, yes.

14 Q. It can be done?

15 A. It can be done depending upon the  
16 circumstances.

17 Q. Exactly. Okay. So --

18 A. And the law.

19 Q. All right. Now, what do you  
20 appreciate to be the claims made in this  
21 case?

22 A. You want me to go down the  
23 pleadings?

24 Q. Yes, so that we can do this  
25 analysis.

1           A.       Well, as I understand it, there  
2       are multiple causes of action. I'm not  
3       going to try by memory to get them all. But  
4       there's a claim of negligence and strict  
5       liability and breach of warranty. There's  
6       some claims of violation of consumer  
7       protections, state consumer protection  
8       statutes. There's a claim of infliction,  
9       intentional infliction of emotional  
10      distress.

11           Q.       Okay.

12           A.       There is common law fraud and  
13      misrepresentation.

14           Q.       Okay. All right. Now, would you  
15      agree with me that in each of those claims,  
16      what is common is the conduct of the  
17      defendants? Conduct, I believe your words  
18      were, conduct and knowledge of the  
19      defendants?

20           MR. McDERMOTT:

21                   Object. Compound question. Why  
22      don't you go over them claim by claim.

23           EXAMINATION BY MR. BRUNO:

24           Q.       Well, do I need to go through them  
25      claim by claim? Isn't it true that what's

1 common to each of these causes of action is  
2 the conduct and the knowledge of the  
3 defendants? If that's not susceptible to  
4 answer grossly, I will ask them  
5 individually.

6 A. I guess there's an element in each  
7 one of these that focuses on some form of  
8 conduct of the defendant. I think the --  
9 those elements are not identical in each of  
10 the causes of action. And, of course, there  
11 are other elements in those causes of action  
12 that also -- that also relate to the conduct  
13 of plaintiffs, either in a defensive posture  
14 or as elements themselves.

15 But in some fashion, I guess you  
16 wouldn't have a claim against a defendant if  
17 it weren't based in some fashion upon the  
18 defendant's conduct. I don't think the  
19 conduct is necessarily identical in these  
20 claims.

21 Q. Well, I wrote this down. Tell me  
22 if I took it down wrong. You said that  
23 conduct and knowledge of the defendant,  
24 that's an easy one with regard to  
25 commonality. Did you mean that?

1           A.       It's an easy one if that is the  
2       only issue that will resolve this case.  If  
3       there are no individualized additional  
4       issues, if there are no defensive issues  
5       that have to focus on the plaintiff's  
6       individual conduct, if there are no  
7       questions of individual causation, if that's  
8       the only issue in the case, then it may be,  
9       as in the Agent Orange case, that you can  
10      focus on government contract defense; in the  
11      Jenkins case, the state-of-the-art defense  
12      became terribly important and there were few  
13      individual issues, then you may be able to  
14      use a common trial, if that's the  
15      situation.

16           Q.       The bottom line is, Ed, that the  
17      conduct of the defendants is common with  
18      regard to these claims in this case; isn't  
19      that true?

20           A.       I don't -- I can't use the word  
21      "common."  They all focus on some form of  
22      conduct of the defendant.  I suppose you  
23      wouldn't have a cause of action if they  
24      didn't.  That conduct is not the identical  
25      conduct.  Each one has different elements of

1 the cause of action.

2 Q. With regard to the negligence  
3 claim, isn't it true that the conduct and  
4 the knowledge of the defendant is common  
5 vis-a-vis the class?

6 A. Whether the defendants were  
7 negligent in the manufacture and sale of the  
8 cigarettes is a common question within the  
9 negligence matter.

10 Q. All right.

11 A. Now, whether, of course, that  
12 negligence was the proximate cause of  
13 injuries to each class member is not a  
14 common issue; it's an individual issue. And  
15 whether there are defenses whereby each  
16 class member has assumed the risk or has  
17 contributed to the negligence in a causal  
18 way is an individual question. But, yes,  
19 that's --

20 Q. All right.

21 A. The problem is if what you want to  
22 know is are there some common issues here,  
23 there are some common issues. The problem  
24 is that, unlike some of the other class  
25 actions we've talked about, these common

1 issues are not going to take us very far in  
2 resolving this in a class-wide basis because  
3 they are offset with individual issues in  
4 which sometimes the evidence overlaps and  
5 which, in any event, we're going to have to  
6 break down into individual trials.

7 Q. Well, we have to ultimately break  
8 down into individual trials in every mass  
9 tort; isn't that true?

10 A. On the damage issue?

11 Q. Of course.

12 A. Normally, that's correct.

13 Q. Normally, that's correct. And  
14 yet, as we pointed out, mass tort litigation  
15 is an appropriate type of litigation for  
16 class action use; right?

17 A. Well, it's a very different  
18 matter, it seems to me, to deciding that if  
19 one can decide common class-wide issues and  
20 resolve the liability phase, that then all  
21 one has to do is have individual trials or  
22 in some cases aggregates of trials, four or  
23 five cases and mini trials, to determine  
24 just what the extent, for example, of  
25 asbestos -- of the five asbestos-related

1 diseases is.

2 If once -- If there are no  
3 problems of comparative negligence, no  
4 problems of assumption of risk, there are no  
5 individuated issues, then, as they decided  
6 in Jenkins, it may make some sense to deal  
7 with the liability issues in Phase 1 or a  
8 trial.

9 There are common issues here that  
10 one could segment, but it's not just simply  
11 finding a common issue or one or two; it's  
12 whether you can resolve those in a class-  
13 wide sense in a way that will help to  
14 resolve this litigation as opposed to just  
15 saying, well, look, why don't we just try  
16 this. If we're going to have to have a mini  
17 trial regarding Class Member A's causation,  
18 regarding his assumption of risk, regarding  
19 his comparative negligence, regarding the  
20 statute of limitations issues as it relates  
21 to him and the damages, why not try the  
22 case?

23 Q. Well, would you agree with me  
24 then, based upon what you've said, is that  
25 the fair thing to do would be to examine the



1 elements of each cause of action and have a  
2 determination of whether or not there are  
3 common issues that can be resolved on a  
4 class-wide basis?

5 A. Well, that's what I --

6 Q. Is that a fair thing to do?

7 A. That's what I've attempted to do.  
8 I've attempted to look at -- to determine  
9 whether there are common issues. And as  
10 I've indicated to you, there are a few.

11 Q. Sure.

12 A. The problem is that those issues  
13 in some cases, the evidence that will prove  
14 them will overlap with other evidence that  
15 will have to be proved individually. They  
16 create bifurcation problems. And I'm not at  
17 all sure they take us very far in  
18 accomplishing an economy in this case.

19 Q. Well, that sounds pretty vague to  
20 me, though. Have you undertaken an  
21 evaluation of each of the causes of action,  
22 separated the elements of each of those  
23 causes of action, and made a determination  
24 of what common issues there are and what  
25 common issues there are not? Have you done

1       that?

2           A.       Yeah, pretty well. I've talked  
3 about a number of the issues that arise in  
4 these various causes of action and indicated  
5 that I believe they're not susceptible of  
6 class-wide proof.

7           Q.       Well, in the context of negligence  
8 you've already agreed with me that the  
9 conduct and knowledge of the defendants is  
10 common. That's susceptible of class-wide  
11 determination; correct?

12          A.       And I've just said that that --  
13 that isolating out one common issue does not  
14 do much for the resolution of the case when  
15 you're going to have to compare that  
16 negligence of the defendant with the  
17 negligence of the plaintiff. And when  
18 you're going to have to raise defensive  
19 issues and you're going to have to prove  
20 individual causation.

21          Q.       Well, the issue of whether or not  
22 the defendants are even entitled to raise  
23 the defense of comparative negligence is, in  
24 itself, a common issue; isn't that true?

25          A.       I don't know. Your notion that an

1 issue of law is a common issue?

2 Q. Based upon conduct, yes.

3 A. If they're entitled to raise it --

4 Q. At all.

5 A. -- at all, that seems to me to be  
6 an issue of law that a judge is going to  
7 determine in a class action or in an  
8 individual trial.

9 Q. Well, then, you would agree with  
10 me that it is something that can be done so  
11 that it has class-wide implications; right?

12 A. Well, --

13 Q. If the judge is doing it, it's a  
14 law issue, according to you, he makes his  
15 ruling, it affects the entire class, so it's  
16 susceptible to class-wide determination;  
17 true?

18 A. No, it's not susceptible of  
19 class-wide determination. A judge in any  
20 event is going to decide issues of law,  
21 whether you have individual trials or a  
22 class action.

23 Q. Yes.

24 A. It's as a matter of law. Now, if  
25 the question is have -- has the individual

1 plaintiff raised a sufficient quantum of  
2 proof in order to get to the jury on the  
3 question of assumption of risk, I take it  
4 that's a mixed law and fact question, and I  
5 think that can't be tried in a class trial.  
6 It has to be tried individually.

7 Q. Well, that wasn't my question. My  
8 question was whether or not the defendants'  
9 entitlement to the defense of comparative  
10 negligence is something that could be  
11 resolved on a class-wide basis, may be  
12 resolved in favor of the defendants, I don't  
13 know?

14 A. Well, that's a misuse of the term  
15 "resolved on a class-wide basis." If all  
16 you're asking me is in a class action, if  
17 there are issues of law, will the judge  
18 decide them in a way that's applicable to  
19 all the parties, yes, that's correct. But  
20 there is a -- that doesn't tell us very  
21 much.

22 Q. All right. What about the  
23 entitlement to assumption of the risk?  
24 That's something the Court could determine  
25 on a class-wide basis?

1           A.       If it's a matter of law, yes. A  
2 judge is going to have to decide if under  
3 the law of the State of Minnesota, for the  
4 people to whom Minnesota law applies,  
5 whether there is a defense of assumption of  
6 risk. Yes, the judge will decide that as a  
7 matter of law.

8           Q.       Will decide that. All right.

9           A.       But, of course, as to whether any  
10 individual plaintiff has raised sufficient  
11 evidence to present that to a jury is an  
12 individual determination that will have to  
13 be made in an individual trial.

14          Q.       Well, with regard to assumption of  
15 risk, one of the factors of determination,  
16 as I pointed out some time ago, you have to  
17 first tell me what the risk is factually;  
18 correct?

19          A.       Well, if part of the problem is  
20 determining what the risk is, I think that's  
21 for a jury, yes.

22          Q.       Right.

23          A.       Factually, in relation to the  
24 individual plaintiff involved.

25          Q.       But in this case, the defendants

1 don't agree with regard to what that means,  
2 that is, what the risk is, so we have to  
3 have that determined; don't we?

4 A. You're mixing questions of law and  
5 fact here. There is probably some -- There  
6 may be some legal issue as to whether, under  
7 the law of Minnesota, assumption of risk can  
8 entail this, A, B or C or whatever. And if  
9 it's phrased in that way, it's a question of  
10 law for a judge and a judge will decide  
11 that. Then, of course, the question is  
12 applying that defense of assumption of risk  
13 to each individual class member, a jury's  
14 going to have to do that.

15 Q. Ed, isn't it true that with regard  
16 to the assumption of risk defense, you have  
17 to first show in every instance where you  
18 undertake that defense that the plaintiff  
19 was aware of the risk?

20 A. Oh, evidence that the plaintiff --  
21 Yes, I should think that's right.

22 Q. Right.

23 A. Plaintiff's knowledge is going to  
24 be relevant.

25 Q. Sure. And obviously you have to

1 first establish what, with evidence, the  
2 risk is; correct?

3 A. Yes, I think that's right.

4 Q. All right.

5 A. It may be a question of law and it  
6 may be a question of fact. If, for example,  
7 the plaintiff -- the defendant maintains  
8 that the risk is "X" and the defendant says  
9 that can't be a risk under the law of  
10 Minnesota, then it's a question of law. The  
11 judge is going to have to say "No," that's  
12 not what the risk is as a matter of law.

13 On the other hand, if it's within  
14 the, once having decided a matter of law, if  
15 it is an issue, the jury is going to have to  
16 decide whether, in fact, the risk that the  
17 law requires you to have assumed in order to  
18 make out the defense, they're going to have  
19 to decide whether factually that was  
20 present. And it seems to me that's an  
21 individual determination regarding each  
22 plaintiff.

23 Q. Bottom line is that there is a  
24 factual determination as to what is the  
25 risk, even if there may be some component of

1 law, you have to still make a fundamental  
2 determination of what the risk is before you  
3 can apply that doctrine of assumption of  
4 risk; true?

5 A. Well, there's going -- I don't  
6 understand what the position is. If the  
7 plaintiffs and defendants disagree as to  
8 what the law says the risk is --

9 Q. I'm not talking about the law, Ed,  
10 I'm talking about the facts.

11 A. Okay.

12 Q. Is it one cigarette, is it two  
13 cigarettes, is it three cigarettes, okay?  
14 Is it a low-tar cigarette or is it a  
15 high-tar cigarette? In other words, what  
16 factually creates the risk? That has to be  
17 determined. Whether there's disagreement  
18 between the two sides as to what the risk  
19 is.

20 MR. DELACROIX:

21 For each of the 50 million  
22 potential class members, is that your  
23 question?

24 MR. BRUNO:

25 I thought there was only one



1 counsel speaking for your side.

2 MR. DELACROIX:

3 That's an objection to your  
4 question.

5 EXAMINATION BY MR. BRUNO:

6 Q. I don't understand the question  
7 and it's noted. Ed?

8 A. Let me see if I understand where  
9 we're going here. It seems to me that the  
10 issue of whether in a particular case Class  
11 Member A has assumed the risk or not is  
12 going to have to be on the facts related to  
13 his individual case. Now, if the claim is  
14 that somehow there is some bright line  
15 threshold that as a matter of law will  
16 determine what the assumption of risk is,  
17 then maybe that is a question of law for the  
18 Court. I don't know.

19 But as we've already talked about  
20 in terms of what evidence I'm familiar with,  
21 I don't know how a court is going to make a  
22 common determination that two cigarettes or  
23 ten cigarettes constitutes an assumption of  
24 risk. It seems to me that what we're  
25 talking about is a much more individualized

1 determination regarding that defense.

2 Q. Ed, if the cigarette manufacturers  
3 take the position, as they have, that  
4 cigarettes are not addicting, how can you  
5 put on evidence that a particular plaintiff  
6 assumed the risk that they are addicting?

7 A. Well, I don't know what their  
8 position is --

9 Q. Assume that to be true.

10 A. -- on that --

11 Q. Just for the sake of our  
12 discussion.

13 A. -- that they're not addicting.  
14 But that does not take us very far. If  
15 one -- I've agreed with you that there  
16 are -- We can pick out a few common issues  
17 here and we can say it applies to class  
18 members across the board in some cases or  
19 within certain of the causes of action. And  
20 one of them is nicotine addictive.

21 And if that becomes a major issue  
22 in the same way that state-of-the-art became  
23 a major issue in the Jenkins case, it may  
24 take us farther. But that does not strike  
25 me as being at all central to what is

1 involved here, that the question of generic  
2 causation is not going to solve this case  
3 any more than it did the Agent Orange case  
4 or the tetracycline case or the Hartz Flea  
5 Collar case or the Gerber Baby Food case.

6 In all of those, the Court said a  
7 finding of generic causation doesn't take us  
8 anywhere because the conditions of exposure  
9 are so different and the characteristics of  
10 each class member are so different regarding  
11 the causal effect that we're going to have  
12 to look at those individualized factors.

13 Q. All right. Well, as you said to  
14 us today, your role here is to give the  
15 Court your views; right? To give the Court  
16 some idea of exactly what it needs to  
17 consider in order to resolve this question;  
18 correct?

19 A. Some insights, yes.

20 Q. Sure. I just want to make certain  
21 that I understand where we are right now.  
22 What you've told me is that there are common  
23 issues in the claims made by the plaintiffs  
24 herein; correct?

25 A. I think there are some common

1 issues that one can identify. I think that  
2 they don't -- that, by and large, they're  
3 irrelevant to determining -- to disposing of  
4 the case as a class action.

5 Q. All right. That's fine. That's  
6 your view. But in terms of guiding the  
7 Court with regard to its work, do you agree  
8 with me that it's for the Court to decide  
9 whether or not there are enough common  
10 issues to determine whether or not we should  
11 proceed as a class action?

12 A. Well, of course it's for the Court  
13 to decide whether enough -- but let's not --  
14 it's not merely a matter of saying, "Oh,  
15 there are two common issues and, therefore,  
16 this class action is appropriate." That's  
17 not what the predominance test requires.  
18 The predominance test requires the common  
19 issues predominate.

20 And it is -- And the Court is  
21 going to have to determine that, in fact,  
22 resolving some -- the common issues  
23 outweighs the disadvantages of having to  
24 determine -- to break down, to bifurcate, to  
25 segment and to try issues individually.

1           Q.       That's fine. But I just want to  
2       see if we're clear that if there's a bright  
3       line at least between the plaintiffs and the  
4       defense on this issue, we agree that the  
5       conduct and the knowledge of the defendants  
6       with regard to each of these different  
7       causes of action is susceptible to class-  
8       wide determination; correct?

9           MR. McDERMOTT:

10           I don't think that states his  
11       testimony accurately. I object to the form  
12       of the question.

13           MR. BRUNO:

14           Well, he can speak for himself, I  
15       think. Maybe he can't. But let's give him  
16       a chance.

17           MR. McDERMOTT:

18           We will give him a chance.

19       EXAMINATION BY MR. BRUNO:

20           Q.       Thank you. Ed?

21           A.       Let me just go back to what I  
22       said, to some qualifiers. Under each of  
23       these causes of action, insofar as the  
24       conduct of the defendants impacted uniformly  
25       on the plaintiffs, there may be a common

1 issue. The trouble is that in a number of  
2 these, the manner in which that common, that  
3 common -- the conduct impacted is going to  
4 be an individualized issue.

5 For example, the individual  
6 causation issue, the issue of misrepresenta-  
7 tions regarding the prior knowledge, the  
8 materiality and the reliance of the  
9 plaintiffs and so forth. So we have some --  
10 we have the defendants' conduct which we  
11 can -- which we -- which may be common, but  
12 in most of these cases it interacts very  
13 closely with individualized issues.

14 And the notion that you could try  
15 this in a Phase 1 trial and just ask the  
16 jury the questions as to the defendants'  
17 conduct and not have any evidence as to the  
18 plaintiffs' contributory conduct,  
19 defendants' assumption of risk, defendants'  
20 reliance -- excuse me, plaintiffs'  
21 assumption of risk, plaintiffs' reliance,  
22 doesn't strike me as being a very useful  
23 common trial.

24 You'll get an answer or you could  
25 get an answer, but that answer would be very

1 much like the answer "Is nicotine  
2 addictive?" It's not going to take you very  
3 far in resolving these cases.

4 MR. McDERMOTT:

5 In the next few minutes, why don't  
6 you look for a logical place for you to  
7 break. I don't want to interrupt your  
8 flow.

9 EXAMINATION BY MR. BRUNO:

10 Q. I just want to clarify this so  
11 that this doesn't keep cropping up. We  
12 already agree -- we keep seeming to be  
13 covering the same ground -- causation and  
14 damages, we understand, are not necessary to  
15 be resolved on a class-wide basis in order  
16 to have a class action; correct? Because  
17 you keep bringing up causation.

18 A. No, I don't know how you can -- In  
19 the cases that refuse class action  
20 certification, like the tetracycline case,  
21 they recognized that the causation in that  
22 case couldn't be decided on a class-wide  
23 basis. The generic finding of causation had  
24 no relevance to resolving the case and that  
25 there was no point in certifying a class

1 because of that.

2 Q. I'm talking about in the context  
3 of mass tort, Ed. You already agreed with  
4 me that damages and causation are not  
5 necessary to be common in order to proceed  
6 as a class action. Are you changing your  
7 view?

8 A. No, you have to understand the  
9 context in which we discussed that. In the  
10 context, for example, of the Jenkins case,  
11 the Court decided that it could delay a  
12 final decision on damages because there was  
13 an overarching question of state-of-the-art  
14 and because causation was not really a  
15 problem there -- causation was not  
16 individualized in that case.

17 The people worked in a couple of  
18 facilities where there was asbestos, and all  
19 the Court had to do was determine which  
20 asbestos products were in those and during  
21 what time periods the class members were  
22 there, and it could create a matrix that  
23 would automatically solve the causation  
24 problem.

25 So Jenkins didn't say that you



1 don't -- that you can put causation off. It  
2 was that they -- it could be determined on a  
3 class-wide basis because there was not a  
4 problem of individuated causation.

5 Where there are problems of  
6 individuated causation because of the  
7 differing conditions of exposure and the  
8 different characteristics of the class  
9 members that affects the causal question, as  
10 in the tetracycline case, as in the Hartz  
11 Flea Collar case and so forth, the courts  
12 have generally said that class certification  
13 is improper.

14 Q. So what you're telling me then is  
15 that in the asbestos litigation, everybody  
16 had the same exposure; right?

17 A. The exposure was quite similar.

18 Q. And everybody had the same medical  
19 histories; right?

20 A. They didn't have the same medical  
21 histories.

22 Q. No.

23 A. And that would have to be -- that  
24 would be, properly be determined at the  
25 damage stage.

1 Q. Causation; right?

2 A. The causation could be determined  
3 because of the similarity of exposure and  
4 also because of the confidence that one had  
5 that certain of these asbestos-related  
6 diseases came from the exposure. We don't  
7 have the same kind of certainty that I can  
8 find here.

9 Q. Well, you don't know that because  
10 you're not a doctor?

11 A. No, we don't. But we do know the  
12 degree of subjectivity that the medical  
13 profession seems to have put on it.

14 Q. I'll put it to you that we don't  
15 know the degree of subjectivity because the  
16 Court hasn't heard a whit of evidence on  
17 that; wouldn't you agree?

18 A. If the Court has evidence that is  
19 dissimilar from the DSMs, then it makes me  
20 wonder how it is that the medical profession  
21 could say that this was a fairly complex  
22 diagnostic problem with a lot of subjective  
23 and individualized criteria. If there is a  
24 bright line and the DSMs could have just  
25 said, "Well, any time you smoked a hundred

1 cigarettes, you're addicted," I wonder why  
2 they didn't select that as the test.

3 Q. I don't know why they did or  
4 didn't, but certainly you would agree with  
5 me that whatever the DSM did or didn't do  
6 doesn't dispose of this case?

7 A. Doesn't dispose of it.

8 Q. No, sir.

9 A. All I can speak about is what I've  
10 seen. I've seen no evidence that there is a  
11 bright line test that the Court is going to  
12 be able to adopt.

13 Q. It's not your job -- You want to  
14 break here? Yes, let's go ahead and break.

15 MR. McDERMOTT:

16 Let's take a break.

17 MR. BROWN:

18 Changing to Videotape 3 at  
19 2:26:31.

20 (Whereupon a brief recess was  
21 taken at this time.)

22 MR. BROWN:

23 We're back on the record at  
24 2:36:07.

25 EXAMINATION BY MR. BRUNO:

1 Q. All right. Ed, so we can at least  
2 agree to disagree and perhaps move on. I  
3 think what I'm hearing you saying -- tell me  
4 if I'm wrong -- but your assessment of the  
5 evidence in this case, the medical evidence  
6 in this case with regard to the ability to  
7 prove these various levels of exposure that  
8 would cause these various risks, your  
9 assessment of that evidence is what causes  
10 you to have the opinions that you have  
11 today; isn't that correct?

12 A. Well, it's not my assessment of  
13 the medical evidence. It's my assessment of  
14 what I know about what has been brought to  
15 the fore about what we know about  
16 addiction. And the DSMs that have been  
17 incorporated by the plaintiffs into their  
18 class definition suggest that the criteria  
19 are individualized and quite subjective.

20 Q. Well, I mean, not to beat a dead  
21 horse here, but what you know is your  
22 assessment of the evidence; isn't it?

23 A. Well, it's my assessment of what I  
24 see as the entire case. The plaintiffs seem  
25 to have relied upon the DSMs for -- as some

1        indication of how we define addiction.

2            Q.        All right.

3            A.        And I haven't seen any other  
4        bright line definition.

5            Q.        All right. Now, you are familiar  
6        with the Manual for Complex Litigation; are  
7        you not?

8            A.        Yes.

9            Q.        All right. And the manual  
10       provides a form which the courts have been  
11       suggested to utilize in connection with  
12       class definition; are you familiar with  
13       that?

14          A.        I'm not sure of the exact form  
15       that you're referring to, but there are  
16       forms in the book but I can't -- I don't  
17       have a recollection of that exact form.

18          Q.        Well, let me share with you -- and  
19       I suppose we can go pull it out if we have  
20       to -- but we'll see if we can get some  
21       agreement that the form is a two-step  
22       process? It defines the class and then it  
23       defines the claims or the issues that are to  
24       be resolved in a class action; would that be  
25       reasonable?

1           A.       That sounds reasonable.

2           Q.       Okay. Now, is it necessary to, in  
3       the context of certifying a class action,  
4       that every issue in the case be certified  
5       for class-wide resolution?

6           A.       No. It is possible to certify  
7       certain issues.

8           Q.       Okay.

9           A.       Subject to the comments that I've  
10      already made, subject to the fact that this  
11      would be useful and efficient in doing it.

12          Q.       All right. Now, let's, to  
13      simplify the discussion, take, for example,  
14      a negligence cause of action. And let's  
15      assume for the sake of discussion that the  
16      case is certified and the Court certifies  
17      the issue of the defendants' negligence.  
18      What happens to, from a procedural  
19      perspective, that component of the claim  
20      related to causation and damage? Where does  
21      it go?

22          A.       Well, the Court would have to  
23      bifurcate or polyfurcate, I assume, as to  
24      those additional issues. If it ordered a  
25      class-wide trial to determine the negligence

1 of the defendants, then it would have to say  
2 in the order on question of proximate  
3 causation, on question of defensive issues,  
4 on determination of comparative negligence,  
5 on determination of damages, I'm going to  
6 assign this to an individual trial or "X"  
7 number of individual trials or whatever.

8 The problem I see -- Let me just  
9 make this point about negligence. It's a  
10 very good example. I don't know what you've  
11 gained by putting on the evidence of the  
12 defendants' negligence when you're then  
13 going to have to have a trial, a comparative  
14 negligence trial, in which the jury will  
15 have to hear the same evidence in order to  
16 compare the negligence of the defendant and  
17 the plaintiff.

18 It creates the necessity to have  
19 two trials hear the identical evidence. And  
20 it also runs the risk of -- I'm not sure  
21 what kind of answer one expects to get from  
22 a jury on putting on the negligence. An  
23 answer that you find them negligent would  
24 not push us very far in most of the  
25 jurisdictions that have comparative

1 negligence today because that answer doesn't  
2 help us to resolve the case. They're going  
3 to have to determine -- to compare the  
4 negligence.

5 So we can put it on and we can get  
6 some kind of a -- use interrogatories and  
7 get some kind of an answer but it runs the  
8 risk of conflict and you save no time.

9 Q. Well, I understand that. And that  
10 may all be well and good, but that wasn't  
11 the purpose of my question. What I was  
12 wanting to know is where do you get the  
13 support for the view that there has to be a  
14 bifurcation order entered? I don't see that  
15 in the rule and I'm not aware of any such  
16 rule, so where does that come from?

17 A. It's proper case management, I  
18 should think. The Court doesn't just, it  
19 seems to me, doesn't just certify one issue  
20 without any intention being given as to how  
21 the Court is going to deal with the case for  
22 the rest of the litigation. That's the  
23 whole purpose of making this judgment  
24 regarding certification, that the Court  
25 decides how am I going to handle this in the



1 future.

2 And to just certify one issue  
3 without any consideration as to how this is  
4 going to be resolved later would be very, it  
5 seems to me, wasteful and foolish. It could  
6 get the Court into exactly the kind of thing  
7 we're talking about. And that is later  
8 he'll have to have an individual trial, the  
9 same evidence will have to be replayed, and  
10 there's a possibility of jury conflicts.

11 Q. Well, I understand all that but  
12 that really doesn't answer the question,  
13 because no one suggested that in not  
14 bifurcating that those issues would simply  
15 go away. What I'm asking you, once again,  
16 is what is your authority for the  
17 proposition that if you certify less than  
18 all of the issues in the case that you have  
19 to enter a bifurcation order?

20 A. Well, I don't know how a court can  
21 just certify one issue and not address in  
22 some fashion what the Court is going to do  
23 with the other issues that it knows is in  
24 the case.

25 Q. All right. Well, address in some

1 fashion doesn't necessarily mean  
2 bifurcation; does it?

3 A. What other form of disposition  
4 would you suggest?

5 Q. Case management plan.

6 A. Well, case management --  
7 bifurcation is part of a case management  
8 plan.

9 Q. Can be. Doesn't have to be.  
10 Right?

11 MR. McDERMOTT:

12 Let him finish his answer.

13 A. And case -- I don't know if you're  
14 talking about trying the case before a  
15 common trial on one issue. A case  
16 management plan is going to have to somehow  
17 address how you're going to deal with the  
18 other issues. And call it -- If you don't  
19 want to call it "bifurcation," I'm not sure  
20 that the word is magical.

21 EXAMINATION BY MR. BRUNO:

22 Q. All right. That's what I was  
23 getting at.

24 A. But the result is the same.

25 Q. All right.

1           A.       You've decided that you're going  
2       to, through case management or bifurcation,  
3       whatever, you're going to dispose of it on  
4       an individualized basis.

5           Q.       All right. That's fine. It's not  
6       really necessary that you enter a  
7       bifurcation order but you just have to deal  
8       with it in some fashion; right?

9           A.       It's just a matter of  
10      terminology. If you don't like that word.  
11      But that's what you're doing, you're  
12      deciding that you'll go forward with a  
13      class-based trial on one issue; and the  
14      other issues that are closely related,  
15      you'll cut off causation and put that for a  
16      later time, you'll put off damages, you'll  
17      put off defensive issues for a later time.  
18                  You're essentially bifurcating.  
19      The impact is the same thing as  
20      bifurcating. Another jury is going to have  
21      to decide that case unless, unless the Court  
22      intends, of course, to keep that same jury  
23      on hold to decide these subsequent issues.  
24      And that's, I think, unthinkable in this  
25      kind of litigation.

1 Q. Well, we'll address that in a  
2 moment. But what I want to focus, though,  
3 on is Rule 23(c)(4) specifically says that,  
4 whenever appropriate, an action may be  
5 brought or maintained as a class action with  
6 respect to particular issues.

7 A. That's right.

8 Q. You can certify just some of the  
9 issues?

10 A. That's right, but --

11 Q. All right. And the remaining  
12 issues or the remaining component parts of  
13 the claim, they don't go away, they're just  
14 not handled on a class-wide basis; is that  
15 fair?

16 A. Well, that's right. But the  
17 effect of that is bifurcation. You are  
18 having one -- Bifurcation means you're  
19 having one jury address an issue or a set of  
20 issues, but -- and then you're going to send  
21 that jury home and another jury or in some  
22 other fashion you're going to deal with the  
23 other issues. And that's the impact of  
24 bifurcation, whether you want to use that  
25 word or not.

1 Q. All right. So it's your view then  
2 that if you certify only some of the issues  
3 in any cause of action, that there is a  
4 requirement of law that the same jury  
5 resolve all the remaining issues; right?

6 A. The gasoline products case  
7 indicated that you must try the issues of  
8 liability and damages to the same jury, if  
9 they are so -- are interwoven so that there  
10 would be a danger of confusion or  
11 uncertainty resulting from it. Now, that in  
12 some situations may apply here and some  
13 not. I've talked about some of those  
14 situations where I think it would apply.

15 In terms of it's not absolutely  
16 clear that -- there are some courts that  
17 have suggested that where they're not  
18 interwoven, you may have a separate jury on  
19 liability and damages. I think it's even  
20 more, however, drastic to start  
21 polyfurcating different liability issues.

22 It's one thing to -- where there's  
23 a considerable distinction between liability  
24 and damages to bifurcate those issues. But  
25 to let one jury decide the plaintiffs'

1 negligence and another jury decide  
2 comparative negligence and another jury  
3 decide issues -- other defensive issues and  
4 causation, I think, causes serious, serious  
5 problems of inconsistency and, very  
6 possibly, violation of Seventh Amendment.

7 Seventh Amendment cases are very  
8 concerned about -- And, by the way, certain  
9 states, Texas, has a very strict rule  
10 against bifurcation. So it varies from  
11 state to state. And to the extent that Erie  
12 would require those kinds of procedures to  
13 be applied, I'm not at all sure what they  
14 would be, but they --

15 Q. You're making another gross  
16 assumption, that is, that the federal courts  
17 are not empowered to bifurcate claims in the  
18 face of a state court rule against them?

19 A. I'm inclined to think that  
20 probably it's a matter of procedure for a  
21 federal court to decide. It does raise Erie  
22 questions, but I tend to agree with that.

23 Q. Now, are you familiar with a case  
24 entitled Cimino versus Raymark?

25 A. Yes.

1 Q. And you are familiar with the fact  
2 that that was an asbestos litigation?

3 A. That's right.

4 Q. You are familiar with the fact  
5 that all the plaintiffs were all exposed  
6 differently?

7 A. In Cimino is very similar to  
8 Jenkins. Those were -- The plaintiffs came  
9 from a small number of facilities in the  
10 Eastern District of Texas. They were all  
11 exposed occupationally in buildings in which  
12 there was asbestos, and there was no  
13 evidence that they volun -- that they were  
14 even aware of its presence.

15 So it's very much like Jenkins.  
16 It was a judge -- It's like Jenkins in that  
17 what Judge Parker did there is he took all  
18 of the cases that were then pending on his  
19 docket, they came from a small number of oil  
20 refineries and a few other facilities, and  
21 they were all occupational exposure cases.

22 Q. Well, really what he did was he  
23 empowered a special master to evaluate  
24 whether or not that there were issues that  
25 were susceptible to common mini trials;

1 didn't he?

2 A. Well, he had a special master's  
3 report to study that. And, of course, he  
4 also attempted to resolve in a -- by using  
5 certain interesting social science methods  
6 to even resolve the damage issues through  
7 trying representative trials and to  
8 extrapolate. He was mandamused in the  
9 Fibreboard case on that approach.

10 Q. We're well aware of that, but that  
11 wasn't what I was asking you.

12 A. Yes.

13 Q. Because we know that Parker tried  
14 it once, he went to the Fifth and they told  
15 him "No," and so he came up with another  
16 plan which is what I'm talking about now.  
17 That came after his rebuff by the Fifth  
18 Circuit; didn't it?

19 A. Yes.

20 Q. So, truly, not relevant to our  
21 discussion?

22 A. Well, that has never been  
23 decided. There's never been an appeal in  
24 Cimino, so we don't really know whether that  
25 method was permissible or not. I think that



1 the methods that Judge Parker used in that  
2 case are probably on the outer boundaries of  
3 what a judge can do, but it was very  
4 creative. And we also know from the Jenkins  
5 case that the Fifth Circuit had some  
6 sympathy with creative approaches because of  
7 the crisis in asbestos litigation.

8 Q. Well, so you would agree with me  
9 then that there is opportunity for creative  
10 approaches in the context of class action  
11 litigation?

12 A. Oh, I think there's always a  
13 possibility of looking for creative  
14 approaches. And that's one of the aspects  
15 that a judge has to consider. Those  
16 creative approaches can't throw to the winds  
17 the fact that certain issues are individual  
18 issues, and that the defendants are entitled  
19 to try those individually to a jury and to  
20 go through cross-examination and so forth.

21 Q. Well, and you would agree with me  
22 that the determination of whether or not to  
23 be creative would be based upon, one, the  
24 history of prior litigation; correct?

25 A. That's relevant, yeah.

1 Q. All right. You've already agreed  
2 with me that it's also relevant to know  
3 about the tactics and strategy of a  
4 defendant in the context of the history of  
5 the litigation?

6 A. I suppose that's relevant, yes.

7 Q. Sure. All right. The likelihood  
8 of success, if individuals proceed solo as  
9 opposed to in a group, like a class action,  
10 that's relevant; right?

11 A. Not only success but what the  
12 possible outcomes of proceeding individually  
13 will be. If there are certain issues that  
14 have not yet been determined, that may be  
15 determined on Summary Judgment or on appeal  
16 and can be resolved, that's relevant, too.

17 Q. All right. And there are broad  
18 social policies that could be at work. For  
19 example, the impact on litigation to, well,  
20 like in this case, where it affects millions  
21 and millions of people; right?

22 MR. McDERMOTT:

23 Objection. Foundation.

24 EXAMINATION BY MR. BRUNO:

25 Q. I thought it was you who said

1       there were 50 million people who did  
2       something in this case, but --

3                       Ed?

4               A.       Let me address that aspect. It is  
5       appropriate to use the class action device  
6       in certain kinds of cases where a wrong has  
7       been done to all of the members of a class.  
8       But the amount of money involved for each  
9       one is so small that it's not feasible  
10      economically for each one to litigate  
11      separately.

12                   And the Paradigm cases are a case  
13      where a utility, for example, overcharges  
14      all of their customers and the average  
15      overcharge would be 25 dollars. And it  
16      wouldn't be feasible for each one to  
17      litigate it. And a class action is an  
18      appropriate device.

19                   That's a case where if, indeed,  
20      you have a genuine harm and you have reason  
21      to believe that there is a desire to  
22      litigate it, and in the case of a money  
23      overcharge there's not much doubt, everyone  
24      would be happy to get back that amount of  
25      overcharge if you didn't have to go and hire

1 his own attorney and undertake it, which he  
2 couldn't.

3 It seems to me a class action with  
4 a new theory like we have here where there  
5 are no other pending cases, there is no  
6 indication of a large number of people who  
7 want to litigate this at this point, is sort  
8 of a creating of an opportunity for  
9 windfalls.

10 I don't think that the consumer  
11 problem where there is a harm, it's a  
12 demonstrable injury, and the problem is that  
13 individuals can't litigate it themselves has  
14 been demonstrated here. It may be  
15 demonstrated at some point down the road. I  
16 don't know.

17 But at this point, we have a  
18 theory based on a very subjective notion of  
19 addiction but with some, it seems to me,  
20 some unnovel and undecided issues as to  
21 whether one can presume emotional harm from  
22 that addiction. Now, emotional harm having  
23 nothing to do with genuine physical injuries  
24 resulting from tobacco. And it seems to me  
25 that that is not the classic application of

1 that doctrine. That is a policy that  
2 applies to class actions, but I don't see  
3 its application here.

4 Q. Now, it's interesting that you  
5 talk about those overcharge cases. It's  
6 also possible that the Court can fashion a  
7 remedy that does not individually compensate  
8 plaintiffs, you can compensate the class as  
9 a whole under certain circumstances; can't  
10 you?

11 A. Fluid recovery?

12 Q. Yes.

13 A. Fluid recoveries are possible in  
14 some situations. Cases have also held that  
15 a fluid recovery, the Manischewitz case, for  
16 example, where the fluid recovery really did  
17 not have any relationship to plaintiffs in  
18 the class wanting to be compensated. The  
19 Court said that this is just a misuse of the  
20 class action.

21 So fluid recoveries are possible  
22 but they must be rather closely related to  
23 the injuries, to actual injuries and harm  
24 done to the class.

25 Q. All right. You would agree with

1 me that a medical monitoring fund would be  
2 closely related; wouldn't you?

3 A. Well, a medical monitoring fund  
4 could be related. But what I find about  
5 that is it is staggering to me to think of  
6 how you would administer a medical  
7 monitoring fund for 50 million or a hundred  
8 million people, for a third of the  
9 population.

10 It seems absolutely staggering  
11 that people would all -- all of the 50  
12 million smokers would come in every three  
13 months to be monitored to determine whether  
14 they're addicted. And whether they're  
15 experiencing emotional harm from this.

16 I don't -- I don't know where  
17 that -- A medical monitoring fund makes some  
18 sense in cases where people have been  
19 exposed but a disease has not yet been  
20 manifested. And those are the kinds of  
21 cases in which it's been applied. This  
22 doesn't seem to me to be that case.

23 Q. Well, that's funny, I just want  
24 to -- I'm listening to you talk here. Are  
25 you telling us that -- Assuming just for the

1       sake of our discussion here that the  
2       defendants have done something wrong and  
3       that what they've done wrong has caused some  
4       amount of damage that would not make it  
5       worthwhile to pursue individually.

6               Are you telling us and this Court  
7       that, because the cigarette manufacturers  
8       have affected a whole bunch of people, that  
9       there should be no recovery?

10            A.       No, I think that -- I think that  
11       if it's clear that there is a harm, I would  
12       feel better if, in fact, there was some  
13       litigative history on both the legal and  
14       factual issues here.

15               Indeed, that may be established by  
16       trying some individual cases. These cases  
17       may survive Summary Judgments and juries may  
18       react favorably to them. I don't know.  
19       Then the case comes closer, it seems to me,  
20       to the overcharge cases in which there is a  
21       demonstrable harm. The medical monitoring  
22       fund is staggering just from a management  
23       viewpoint to --

24            Q.       That's why I put the question to  
25       you. Who cares if it's staggering if, in

1 fact, the harm has been done?

2 A. But as I understand the  
3 plaintiffs' thesis here is that addiction --  
4 from addiction we can presume emotional  
5 harm. And that, in fact, people are  
6 addicted if they have continued to smoke  
7 after being warned by a medical practitioner  
8 of the dangers, which seems to me to be just  
9 about all smokers.

10 When we're talking about 50  
11 million smokers being monitored to determine  
12 whether there is emotional harm, when we've  
13 already presumed that emotional harm will  
14 arise from the addiction, I'm not sure what  
15 all that means. What are we getting at?

16 Q. Well, I suggest to you that you're  
17 wrong in your interpretation. But that's,  
18 again, what we will show, if given the  
19 opportunity to put on the evidence.

20 But, in any case, just so I'm  
21 clear on this, though, you do agree that if  
22 you do a wrong to 50 million people, you  
23 should pay, regardless of the manageability  
24 problems; right?

25 A. Oh, yes, I don't have any



1 difficulty with that.

2 Q. Okay. Now, you keep saying  
3 there's no --

4 MR. McDERMOTT:

5 Let him -- Did you finish your  
6 answer?

7 EXAMINATION BY MR. BRUNO:

8 Q. I'm sorry. I thought you were  
9 finished. I apologize.

10 A. Well, all I was going to say is  
11 certainly if there has been an injury and it  
12 is determined that that injury exists, they  
13 ought to pay. I think that the nature of  
14 determining that injury in this particular  
15 case is a very individualized one and I  
16 don't think it can be determined in  
17 certifying a couple of class issues and then  
18 turning it over to some administrative  
19 process.

20 But, certainly, if it's been  
21 determined that there is harm and it can be  
22 done and the individualization can be given  
23 and 50 million people recover under it, of  
24 course, the payment should be made.

25 Q. All right. Well, as you say, you

1 have some knowledge of, let's call them  
2 allegations, with regard to cigarettes;  
3 don't you?

4 A. (Witness nods head affirmatively.)

5 Q. You are aware of the fact that  
6 some people say that cigarettes kill 450,000  
7 people a year; right?

8 A. (Witness nods head affirmatively.)

9 Q. You are aware that some people say  
10 that cigarettes are addicting so that people  
11 are buying cigarettes because they're  
12 addicted, not because they want to; right?

13 A. Yes.

14 Q. Are you aware of the fact that  
15 some pretty serious allegations have been  
16 made about the conduct of the executives of  
17 the cigarette manufacturers, are you aware  
18 of that?

19 A. Yes.

20 Q. You're aware that allegations have  
21 been made that tests and studies were done  
22 in the sixties and withheld from the public;  
23 right?

24 A. Yes.

25 Q. Are you aware of all of those?

1           A.       Yes.

2           Q.       Would you agree with me that those  
3 are very serious allegations?

4           A.       Yes. Let me talk about that list  
5 for just a moment in order to answer your  
6 question properly.

7           Q.       Sure.

8           A.       There are allegations that tobacco  
9 causes diseases. You said 450,000 deaths a  
10 year; was that the figure? I don't know  
11 what the figure is.

12          Q.       I've read it. I'll be the first  
13 one to say I don't know if it's accurate or  
14 not. But it's in the media.

15          A.       And but this is not -- this case  
16 is not about that, as far as I can  
17 understand. This is not a class action that  
18 is bringing together the victims of tobacco-  
19 related diseases so that they can recover.  
20 Indeed, most of those people have  
21 substantial enough claims that they're quite  
22 capable of litigating the cases themselves.  
23 The only reason that some probably don't  
24 litigate them is because they've been so  
25 unsuccessful on the merits in these cases.

1           This case, as I understand it, is  
2           a case that is based on attempting to get  
3           what is probably ultimately going to be a  
4           very small amount of damages for 50 million  
5           people or a hundred million people on an  
6           assumption that emotional harm arises out of  
7           addiction. And addiction seems to be pegged  
8           to some kind of level.

9           I'm not sure that this responds to  
10          all of those allegations. Now, the conduct  
11          allegations that you mentioned about the  
12          conduct of the industry, of course, are  
13          properly raised in this case. And insofar  
14          as the causes of action are going to hold up  
15          and the novel issues are decided, that will  
16          be resolved.

17          And, of course, that's appropriate  
18          that that kind of conduct, if it's  
19          demonstrated and the elements of cause of  
20          action are demonstrated there, it's  
21          appropriate that there should be some form  
22          of recovery if damages are shown.

23          Q.       Ed, but you're the one who said  
24          yourself that, you know, you needed to get  
25          some litigation started so you can get a

1 little history, you can kind of see where  
2 you're going, right, you said that?

3 A. Yes, I think that would be useful.

4 Q. All right. And we also know that  
5 it's incredibly expensive to litigate one of  
6 these things, that oftentimes the  
7 manufacturers will put a lot of resources  
8 together to oppose you; correct?

9 A. Yes, it can be.

10 Q. All right. And we also know that  
11 the primary defense is assumption of the  
12 risk to cancer and emphysema and all of the  
13 other like cases; right?

14 A. Yes.

15 Q. So wouldn't it seem to be a  
16 logical place to start in that process to  
17 determine whether or not cigarettes are  
18 addictive so that an attack could be mounted  
19 on the defense of assumption of risk  
20 itself? Wouldn't that be a positive thing?  
21 At least to have it resolved one way or the  
22 other?

23 A. Well, I didn't realize that that  
24 was the role of this litigation was to --  
25 was that this is only a stepping stone to

1 coming back at the more serious claims with  
2 another theory.

3 Q. All litigation is a stepping  
4 stone, according to what you just told me.

5 A. Well, --

6 Q. Right?

7 A. No. I think that litigation has  
8 to be looked at on the merits of the  
9 particular claims. If, if the merits of the  
10 tobacco-related disease litigation have been  
11 uniformly rejected, both on legal and on  
12 factual grounds by juries, I'm not sure the  
13 utility of coming forward with an emotional  
14 distress case arising out of a flimsy claim  
15 of addiction, if indeed it turns out to be  
16 that.

17 But I'm looking at this on its  
18 merits, not as a stepping stone but on its  
19 merits. And that is if one can demonstrate  
20 that these individuals have been -- have  
21 become addicted and that those addictions  
22 have certain kinds of emotional harms, and  
23 if that can be proven and demonstrated, I  
24 think these individuals are entitled to  
25 recover.

1           The problem is that I think there  
2           are a lot of novel issues there and I think  
3           a court has to decide are we going to embark  
4           on this mammoth class action as the way to  
5           do that when we don't know very much about  
6           the strength, the quality of evidence, the  
7           length of time, the importance of --  
8           representative importance of issues and so  
9           forth.

10           Q.       What are these novel issues that  
11           you keep referring to? I don't understand.  
12           What's so novel?

13           A.       Well, I don't know whether, for  
14           example, the presumption that the plaintiffs  
15           have suggested of emotional harm arising out  
16           of addiction can be sustained in the law.

17           Q.       We don't make that presumption.

18           A.       I think the term "presumption" was  
19           used, as I recall, in the answers to the  
20           interrogatories, that one can presume  
21           emotional harm from the addiction. But I  
22           think there are probably questions of  
23           causation arising from it.

24           Q.       All right. So you're saying to me  
25           that the novel -- the first novel issue is

1 this, what you call, the plaintiffs'  
2 presumption that emotional harm arises from  
3 addiction?

4 A. Well, presumption and, of course,  
5 the causal nature, that if there is -- if  
6 there is addiction, that emotional harm can  
7 arise from it, it's compensable, that it  
8 rises to the level of severity of the law of  
9 the 50 states. And, of course, we're  
10 talking about different, different  
11 approaches to these things in the 50 states.

12 Q. Right.

13 A. That it is a policy matter that  
14 the 50 states are willing to compensate.  
15 Another question, of course, is the nature  
16 of addiction. Whether, in fact,  
17 addiction -- people who continue to smoke  
18 are people who are exercising some kind of  
19 personal choices or whether they are  
20 compelled in such a conclusive manner that  
21 they've lost free will and have to continue  
22 to do so. These seem to be medical  
23 issues --

24 Q. I would agree with you there.

25 A. -- legal issues.



1 Q. They're not legal issues.

2 A. It seems to me that they very well  
3 may be on the level of evidence and are  
4 needed to prove these things.

5 Q. We agree.

6 A. Which may be Summary Judgment and  
7 may be directed verdict questions. I don't  
8 know. As far as I know, the addiction  
9 theory as the basis of a cause of action is  
10 a relatively new theory. I think addiction  
11 has been discussed before, as I understand  
12 it, in litigation but not as the basis of a  
13 cause of action.

14 Q. Well, at least then we agree that  
15 these are not novel procedural issues; are  
16 they?

17 MR. McDERMOTT:

18 What are not novel procedural  
19 issues?

20 MR. BRUNO:

21 The issues that he just identified  
22 as novel.

23 MR. McDERMOTT:

24 I'm not sure he identified them as  
25 procedural, but all right.

1 EXAMINATION BY MR. BRUNO:

2 Q. No, he didn't. That's why I'm  
3 asking the question, all right? These are  
4 not novel procedural issues; are they?

5 A. No, these seem to be much more  
6 substantive. They're going to have to be  
7 decided under the 50 laws of the states as  
8 to how they fit into the various causes of  
9 action that are claimed here.

10 Q. That's fine.

11 A. But there are -- By the way,  
12 you're quite right in raising procedural  
13 issues. Some of the procedural issues are  
14 quite interesting because we're talking  
15 about an unparalleled class action involving  
16 many, many larger numbers of members than  
17 we've ever seen before, with lots and lots  
18 of individuated issues.

19 So we are talking about a court --  
20 Judge Parker decided to go the class action  
21 route after having tried lots of cases,  
22 being familiar with lots of the procedural  
23 issues. Here we don't have the same kind of  
24 familiarity.

25 Q. Ed, you keep talking about novel

1 and unparalleled and I'm trying to see if we  
2 can't get focused. The class action as a  
3 procedural device, identify for me the  
4 unparalleled, novel procedural issues that  
5 arise because of this particular cause of  
6 action that we plaintiffs have sought to  
7 bring.

8 A. Well, I've talked about a number  
9 of them. You suggested that the Court would  
10 be able to certify a couple of common  
11 issues.

12 Q. Okay.

13 A. Such as the conduct of the  
14 defendant regarding negligence. And that  
15 the Court can certify those and leave the  
16 rest to be resolved at some future time  
17 through a case management plan.

18 Q. Is that novel?

19 A. Leaving it unresolved, I think, is  
20 pretty novel and unorthodox.

21 Q. I didn't suggest it would be  
22 unresolved. I say it was unresolved on a  
23 class-wide basis. At least give me that  
24 much.

25 A. Okay. Then I think it does have

1 to be resolved in some fashion.

2 Q. I agree.

3 A. Through bifurcation, through case  
4 management, whatever. I can't think of  
5 other cases that have posed quite the number  
6 of individual issues that arise in this  
7 case. We talked about all those individual  
8 issues.

9 The interconnection of those  
10 individual issues and the procedural  
11 pressures it will put on a class action  
12 court to determine how to bifurcate off some  
13 common issues and what to do with all the  
14 individual issues and how to resolve it,  
15 it's quite a management nightmare.

16 Q. Well, it's not novel, though?  
17 Nothing new about having a bunch of  
18 issues --

19 A. Maybe "novel" is not the word.  
20 Maybe it's --

21 Q. It's big.

22 A. It poses serious and complex  
23 problems of management.

24 Q. All right.

25 A. Maybe that's the way to put it,

1 yes.

2 Q. All right. Serious and complex  
3 problems. That's because there are so many  
4 people involved?

5 A. Not just so many people but the  
6 nature of the claims and the individual  
7 nature of those claims and defenses.

8 Q. All right. Well, but there are --  
9 well, scratch that. Would you agree with me  
10 that there would be -- it would be  
11 worthwhile for the Court to undertake to  
12 determine an assessment of the claims to  
13 determine whether or not there are common  
14 issues?

15 A. Oh, certainly. That's what we've  
16 been talking about.

17 Q. Right. And to see if the Court  
18 could formulate some procedures in order to  
19 deal with this, as you call this, this  
20 management nightmare?

21 A. Certainly.

22 Q. And you -- Okay. Let's leave that  
23 for a second and talk about class  
24 definition. What are the hallmarks of what  
25 you would accept as an appropriate class

1 definition?

2 A. I don't know how I can sit and  
3 write for the plaintiffs a class  
4 definition. I've tried to point out the  
5 problems that I saw in it as it's  
6 structured. There are some things that can  
7 be remedied by alteration. They're the ones  
8 I've mentioned before.

9 It seems to me that -- The  
10 nationwide character of this class action,  
11 by the way, seems to me to be a start of the  
12 most -- one of the most serious problems of  
13 how to try a nationwide class action under  
14 diversity jurisdiction, the laws of 50  
15 states.

16 So the nationwide character of the  
17 class is one serious problem; the addition  
18 of possessions and territories, I've  
19 discussed; the addition of not only present  
20 smokers but of former smokers and future  
21 smokers are problems; the addition of  
22 survivors and relatives and other people,  
23 they all cause various problems. And I've  
24 addressed those.

25 Q. That wasn't my question.

1 A. Okay.

2 Q. Maybe I'll just read from your  
3 book and see if you agree with me. I asked  
4 you what were the hallmarks of a class  
5 definition and you wrote in your book at  
6 Page 243 the following: It says, "Even  
7 before one reaches the four prerequisites  
8 for a class action, there must be an  
9 adequately defined class," you said that.

10 "The first dozen words of Rule  
11 23(a) suggest this requirement: One or more  
12 members of a class may sue or be sued.  
13 Considerable attention has to be given to  
14 the definition of the class that is proposed  
15 to the Court. It must be clear enough that  
16 the Court and the parties understand who it  
17 includes, though the exact persons and even  
18 the exact number of persons it contains is  
19 not necessarily required." Okay?

20 A. Yes, sir.

21 Q. Now, that's what you wrote. So  
22 would that be responsive to my question when  
23 I asked what are the hallmarks of a class  
24 definition?

25 A. I think that's a terrific answer.

1 Q. That's what I thought. That's  
2 what I hoped you would give me.

3 MR. McDERMOTT:

4 In fairness to the witness, I  
5 thought you were talking about this case as  
6 well and not a general proposition of law,  
7 but --

8 EXAMINATION BY MR. BRUNO:

9 Q. Well, I said what are the  
10 hallmarks of a good class definition.

11 A. I'm sorry I went off on this  
12 case. I agree with that. I think my  
13 earlier testimony is consistent with that.

14 Q. Sure. Well, I understand advocacy  
15 very well, as you know, so -- In any case,  
16 the definition has to permit the Court to  
17 identify and it has to permit members to  
18 identify themselves; correct?

19 A. Yes.

20 Q. All right. And I believe that you  
21 said that it really shouldn't contain  
22 anything that would require a merits  
23 determination, that is, in the words of the  
24 definition; true?

25 A. It is best to attempt to avoid



1       that.

2           Q.       All right. Like, for example, you  
3       wouldn't want to certify a class of people  
4       who have been the victim of racial  
5       discrimination?

6           A.       Yeah, frequently they are defined  
7       as people subjected to racial  
8       discrimination, that is, that's what they  
9       claim.

10          Q.       But that's not a good definition?

11          A.       Well, that's been accepted  
12       because -- The Court, of course, does not  
13       determine at the class certification stage  
14       the merits of the case. It doesn't mean  
15       that in certifying the class the Court has  
16       to determine that each one of those has, in  
17       fact, been subjected. It's that they're  
18       making a reasonable claim to that amount.

19          Q.       I see. All right. Now, in this  
20       case we have proposed a class definition.  
21       Is it a requirement of law that, in deciding  
22       whether to certify or not certify, that the  
23       Court has to accept the plaintiffs'  
24       definition?

25          A.       No. The Court -- The Court

1 normally takes the plaintiffs' definition.  
2 If the Court has problems with the  
3 plaintiffs' definition, the Court can  
4 indicate that to the plaintiffs and it might  
5 be modified.

6 Q. All right. So the Court has the  
7 power to modify what we've proposed;  
8 correct?

9 A. Yes.

10 Q. All right. Now, and so if the  
11 test is identifiability, what is it about  
12 the definition that makes its members  
13 unidentifiable in this case?

14 A. I've gone down them before, but  
15 the first problem is nicotine-dependent.  
16 The difficult -- The vagueness of this term,  
17 unless there are some readily identifiable  
18 objective criteria, the criteria that have  
19 been suggested are the DSMs, which seem to  
20 me to be useful and reasonable criteria.

\*21 The problem is that they are going  
22 to require an individualized analysis to  
23 determine who is in that category. And it's  
24 not going to be -- it's going to be very  
25 difficult to inform the public under a dozen

1 DSM criteria as to who is in that category  
2 and who's not.

3 Q. So what you're saying to me is as  
4 a potential member of the class, I am not  
5 able to determine whether or not I am  
6 nicotine-dependent?

7 A. That's right.

8 Q. Okay. All right. Well, suppose  
9 we had a definition that simply said  
10 individuals who have used the defendants'  
11 products and claim damage thereby, would  
12 that be simple enough that people could  
13 identify themselves and the Court could  
14 identify the class?

15 A. Well, the problem with that is  
16 that normally a class definition has to  
17 contain some notion of injury resulting to  
18 the class members from the conduct.

19 Q. I said that.

20 A. I'm sorry. Did I --

21 Q. Let me say it again. Persons who  
22 have used the defendants' tobacco products  
23 and claim damage thereby.

24 A. Well, claim damage, what -- if  
25 you're watching television and it says

1 anyone who has used cigarettes and claims  
2 damage, what would that tell you?

3 Q. It would tell me that I would be a  
4 part of this if I claimed a damage; wouldn't  
5 it?

6 A. And damage means?

7 Q. Any harm.

8 A. Any harm. You're now going to  
9 redefine the class as involving tobacco-  
10 related diseases as well?

11 Q. No, actually what I was doing was  
12 just defining the class because I think you  
13 agreed with me that the Court does not have  
14 to certify all the issues in the context of  
15 damage, it can certify just some of them.  
16 So the Court could, with that definition,  
17 certify the issue of whether or not those --  
18 of the people who claim damages due to  
19 addiction; could it not?

20 A. Oh, you've added now claim damage  
21 due to addiction or --

22 Q. Not in the definition.

23 A. Not the definition.

24 Q. It's a two-step process, according  
25 to the way I look at the Manual for Complex

1     Litigation.     First there's a definition of  
2     who, then there is a definition of what.  
3     There is a distinction made between who and  
4     what's claimed.     But you're not familiar  
5     with that; right?

6             A.       I understand the distinction  
7     you're making.

8             Q.       All right.     Is that an appropriate  
9     way to define the class?

10            A.       Well, I don't think that would be  
11     an adequate class definition.

12            Q.       Why?

13            A.       Because it, too, is overbroad and  
14     vague.     It's going to sweep in individuals  
15     who have no valid claim -- who claim damage  
16     on what legal grounds?     I suppose I smoke  
17     cigarettes and I think that I ought to be  
18     entitled to some money from the cigarette  
19     companies?     I claim damage.

20            Q.       Yes.     Well, let me ask you this.  
21     In every class action, because the  
22     definition includes people, does that mean  
23     that they automatically get paid?

24            A.       No, it certainly doesn't.

25            Q.       It does not.     You have to prove

1 that you've been damaged.

2 A. Yes, that's right.

3 Q. But the definition doesn't require  
4 the proof of damage in order to be a member  
5 of the class; does it?

6 A. Well, it's not proven at this  
7 stage but the damage that is claimed is  
8 going to have to be some identifiable  
9 objective standard so that you can relate to  
10 it. It seems to me that a class action,  
11 let's just say, on behalf of smokers who  
12 have gotten tobacco-related cancer resulting  
13 from that could be a viable class action.

14 Because those individuals can  
15 identify the disease, just as the asbestos  
16 cases identified them as having asbestos-  
17 related diseases and there were five  
18 distinctive asbestos-related diseases. And  
19 this adequately defined those people whose  
20 diseases were directly causal from  
21 asbestos. The notion of nicotine-addicted  
22 has -- simply doesn't have that quality, it  
23 seems to me.

24 Q. Well, again, I say you don't have  
25 to prove that you're addicted in order to be

1 a member of the class, you simply have to  
2 claim it --

3 A. Yes.

4 Q. -- correct? The same way, in the  
5 case of, as you put it, a class of  
6 cigarettes users who claim damage of lung  
7 cancer, you don't have to prove that you  
8 have lung cancer --

9 A. No, that's right.

10 Q. -- to be a member of the class;  
11 correct?

12 A. That's right.

13 Q. That's reserved, as you said, for  
14 another day?

15 A. Well, I think a definition that  
16 would indicate it's just someone, someone  
17 who has smoked cigarettes and claimed damage  
18 would -- I assume that would be everyone  
19 who's ever smoked.

20 Q. So? What's wrong with that?

21 A. Class actions are not well-suited  
22 when they are overinclusive and overbroad.  
23 And that's what we've done, we've not tied a  
24 claim to damage to any legal rights, to any  
25 viable cause of action.

1 Q. Now, Ed, you know that in the  
2 context of racial discrimination that there  
3 are -- there must be at least a hundred  
4 class actions where the definition has been  
5 black people who have been employed by the  
6 XYZ Company from Point A to Point B.

7 A. No, no --

8 Q. There's absolutely no indication  
9 of damage in that definition.

10 A. No, normally it is blacks who have  
11 been discriminated in the conditions of  
12 employment at XYZ Company. It identifies  
13 them in terms of very identifiable kind of  
14 harm. And the harm is that they've been  
15 discriminated against because they're black.

16 Q. All right. And your testimony  
17 today is that addiction is not an  
18 identifiable harm; right? And that's why  
19 you feel the way you feel?

20 A. I'm having -- That's the first of  
21 a number of the problems I had with the  
22 definition. But that's the first of one of  
23 the problems, that the identifiable harm has  
24 no touchstones. And I recognize the  
25 plaintiffs have tried to provide that with



1 the suggestion that a hundred cigarettes in  
2 20 days would do so. I just have some  
3 doubts as to whether there is any medical or  
4 legal support for this kind of presumption.

5 So I -- And I appreciate what the  
6 plaintiffs have apparently been doing.  
7 They've been moving towards attempting to do  
8 so. But I think it seems to me that  
9 essentially addiction is a very individuated  
10 kind of matter, as the DSMs indicate.

11 Q. I don't know where you get the  
12 presumption part, though. You just agreed  
13 with me that you don't have to prove your  
14 damage, so wherein lies this presumption  
15 business? Just because you're a member of  
16 the class doesn't mean that you have  
17 damage. It simply means that you have a  
18 claim for damage and you have an opportunity  
19 to prove those damages; correct?

20 A. The presumption I was referring to  
21 was the notion that if you've smoked a  
22 hundred cigarettes, you're a regular smoker.

23 Q. I don't know where that comes from  
24 either, so --

25 A. Well, that's what I read in the

1       Answers to Interrogatories, that that was  
2       provided as a touchstone. And it is an  
3       attempt to give some kind of greater  
4       certainty to it. I just have my doubts as  
5       to the legal and medical sufficiency of  
6       that.

7               Q.       Well, the problem I have, though,  
8       Ed, with your answer is that you know and I  
9       know that our proposed definition doesn't  
10      contain that language and I'm trying for us  
11      to move along and stick with the question.

12             MR. McDERMOTT:

13               Well, which proposed definition  
14      are you referring to? You've offered some  
15      in your complaint, then in your amended  
16      complaint, then in your memorandum of June  
17      8th, and then in your --

18             MR. BRUNO:

19               As long as we stay in the context  
20      of this line of questioning is all I want.

21             MR. McDERMOTT:

22               All right.

23             MR. BRUNO:

24               I didn't use the word  
25      "presumption." He did. We've already

1 established, I think --

2 MR. McDERMOTT:

3 What definition are you offering?

4 MR. BRUNO:

5 I'm not offering any definition.

6 Joe Bruno is not. I'm here to discuss this  
7 witness' --

8 MR. McDERMOTT:

9 What definition are the plaintiffs  
10 offering?

11 EXAMINATION BY MR. BRUNO:

12 Q. That's not relevant to my inquiry  
13 right now. What I'm wanting to understand  
14 is whether or not you have to prove that  
15 you're damaged before you can be a member of  
16 a class action? And I thought we had  
17 established that you don't have to.

18 A. I agree with that.

19 Q. So the sense here then is whether  
20 or not a person has a perception that  
21 they've been damaged; correct?

22 A. I think that -- I think that the  
23 perception has to be related to some  
24 reasonable legally compensable harm. I  
25 think that to say that I want a class of

1 people who would like to get some money from  
2 the government would not be an adequate  
3 class action.

4 They all would like to have money  
5 from the government; but if you've not  
6 identified some legally cognizable grounds,  
7 then I don't think class treatment is  
8 appropriate.

9 Q. Well, I think I'm hearing personal  
10 opinion here rather than some discussion of  
11 the law because I think I'm hearing you say  
12 that addiction is not a legally compensable  
13 harm. Is that what you're -- I mean, that's  
14 the basis of what you're telling me.

15 A. No, I'm talking now about the  
16 identification of problems in the context of  
17 the class. And I'm saying that I think  
18 that -- I don't know whether the claim that  
19 addiction gives rise to emotional harm will  
20 hold up as a matter of law or not.

21 Q. We don't need to discuss that  
22 right now.

23 A. I just don't know.

24 Q. Do we need to resolve that right  
25 now?

1 MR. McDERMOTT:

2 Let him finish his answer,  
3 please..

4 A. What I am troubled about is using  
5 a class action device to determine what  
6 appears to be an inherently individual  
7 diagnosis. And if -- And the class action  
8 device is only appropriate if somehow there  
9 are enough common issues that can be  
10 resolved so that they predominate over the  
11 individual issues.

12 And the very definition of the  
13 harm here, nicotine addictive, seems to me  
14 not capable of being resolved by class-wide  
15 proof. I think individually each one of  
16 these plaintiffs have a right to go forward  
17 and to claim that harm. And if they are  
18 able to establish legally that there's a  
19 cause of action, I think they're entitled to  
20 do so. The trouble I have is defining a  
21 class according to that very inherently  
22 individual criteria.

23 EXAMINATION BY MR. BRUNO:

24 Q. Ed, I don't know, but I got the  
25 feeling we're going around in circles here,

1       you know, so let me see if I can remember  
2       what you said. I thought that you've  
3       already agreed that mass tort was  
4       appropriate to class certification, yes?

5           A.       In certain circumstances.

6           Q.       And in those certain  
7       circumstances, you have individualized  
8       damages, yes?

9           A.       In certain circumstances. None of  
10      those circumstances exist here, in my  
11      opinion.

12          Q.       I'm not asking you that, Ed.

13          A.       All right.

14          Q.       One question at a time, all right?

15          A.       All right.

16          Q.       Mass tort is appropriate for class  
17      certification, yes?

18          A.       In appropriate circumstances.

19          Q.       And in those appropriate  
20      circumstances, you have individualized  
21      damages; correct?

22          A.       In appropriate circumstances, it  
23      may be possible to have -- to sever off the  
24      damage claim and to have them determined  
25      individually.

1 Q. Exactly. Which is exactly what we  
2 have here.

3 A. No.

4 Q. You don't? You're going to have  
5 to determine individually whether or not a  
6 person is addicted and sustained damage  
7 thereby. What's the difference between that  
8 and a mass tort victim who has to go in and  
9 prove that he's been damaged by either the  
10 pipeline blowing up or the acid rain? The  
11 same exact issue; isn't it?

12 A. Well, we're talking here about  
13 identifying at the outset of the lawsuit for  
14 purpose of notice and opt-out. People who  
15 can get a notice and identify whether they  
16 are in the class or not.

17 Q. Okay.

18 A. And we are identifying them as  
19 nicotine-dependent. And how are you going  
20 to inform them whether the 50 million people  
21 who smoke, as to whether they are nicotine-  
22 dependent?

23 MR. McDERMOTT:

24 While you contemplate the answer  
25 to that question, also contemplate -- we

1 won't put you under oath -- but you can also  
2 contemplate a point where we can take a  
3 break here within the next few minutes.

4 EXAMINATION BY MR. BRUNO:

5 Q. Okay. And, well, I guess I don't  
6 know how to answer your question because I  
7 don't have a problem with telling people  
8 that if they're nicotine-dependent, that  
9 they would come forward. I mean, this is a  
10 matter of a difference of view. This is not  
11 a legal issue.

12 A. So it's just a matter of  
13 personal -- If someone thinks he is --

14 Q. Right.

15 A. -- he feels he's in the class; and  
16 if he thinks he is not, he's not.

17 Q. The same way it was, you know,  
18 when a plant blows up, a person comes in and  
19 makes a claim, it doesn't mean he's going to  
20 win. He may perceive that he's been  
21 damaged, he comes in, he files his notice of  
22 claim, files his proof of claim, he stands  
23 ready, willing and able to come and tell a  
24 jury "I'm hurt," and the jury can choose to  
25 say "You're not hurt"; correct?



1           A.       Well, the difference is if the  
2 class is people who are injured by the  
3 blowup of a plant, we have readily  
4 identifiable criteria. The person was  
5 either there or not there. And we have a  
6 finite number of people.

7           Q.       There or not there. That means  
8 you smoke or you don't smoke; correct?  
9 That's the "there or not there."

10          A.       Well, you're telling me then that  
11 every smoker is nicotine-addictive.

12          Q.       No, sir, I'm not. I am telling  
13 you -- I'm using your analysis. You said in  
14 the injury case either you're there or  
15 you're not. In the smoking case, either you  
16 smoke or you don't. The next step is  
17 whether or not you believe that you've been  
18 damaged by the smoking. Or, in this  
19 particular case, whether or not you believe  
20 that you are nicotine-dependent because of  
21 the smoking; correct? Same exact analysis;  
22 isn't that true?

23          A.       No, no, I don't think it is.

24          Q.       Why not?

25          A.       I think that the problem is that

1 you have defined an overbroad class when you  
2 say we will -- the class is anyone who has  
3 smoked, who has a claim against the tobacco  
4 companies. You've created an overbroad  
5 class and a fail-safe class.

6 Because, of course, if the class  
7 loses, you're going to have every smoker  
8 say, "Oh, I wasn't a member of that class.  
9 I didn't believe that I was nicotine-  
10 addicted. That judgment does not apply to  
11 me." On the other hand, if they win, every  
12 smoker or ex-smoker in America is going to  
13 want to have part of it.

14 And courts have been very  
15 concerned at the unfairness of a fail-safe  
16 class that allows people to opt in or opt  
17 out, depending on the result.

18 Q. Do you think for one moment that  
19 these talented lawyers would not come into  
20 court in the case of a person who said "I  
21 wasn't in the class" and assert that they  
22 were?

23 A. I don't know how you could keep  
24 anyone who said "I was a smoker but I didn't  
25 consider myself to be nicotine-addicted," I

1 don't know how you could possibly controvert  
2 that.

3 Q. What difference does it make if  
4 you're not making a claim for nicotine  
5 addiction?

6 A. Because they will only take that  
7 position if the class loses. If the class  
8 wins, every smoker in America will claim  
9 that they're entitled to whatever damage.

10 Q. Damage from nicotine addiction, is  
11 that what they're going to claim?

12 A. Sure.

13 Q. After we've just lost? It  
14 wouldn't be just res judicata?

15 A. I'm talking about the plaintiffs  
16 winning.

17 Q. Well, I'm sorry, Ed. I'm not  
18 following you. You just said that the real  
19 problem --

20 MR. McDERMOTT:

21 Why don't you keep your voice  
22 down. We don't need to get carried away.

23 EXAMINATION BY MR. BRUNO:

24 Q. You just said, Ed, that if you  
25 lose, if the plaintiffs lose, the real risk

1 is that all of the plaintiffs are going to  
2 say they weren't in the class; right?

3 A. Right.

4 Q. So what is their only  
5 alternative? That is to bring a brand-new  
6 lawsuit making the same claim; right?

7 A. Yes.

8 Q. In the face of just having lost a  
9 class action that says that smoking is not  
10 addictive or they're not liable for  
11 addiction; is that what you're warning us  
12 about?

13 A. Yes.

14 Q. That's not likely to happen; is  
15 it?

16 A. Well, I don't know. For the  
17 tobacco litigation has been very  
18 unsuccessful and yet we have lots of tobacco  
19 cases, including this one. It does not seem  
20 to deter -- lack of success does not  
21 necessarily seem to deter litigation.

22 Q. That would be one of the benefits  
23 of class action, wouldn't it, because you  
24 would have final resolution of these issues  
25 on a class-wide basis so that the cigarette

1 manufacturers could walk away and go home,  
2 pointing to a res judicata determination of  
3 these issues. That's a benefit; isn't it?

4 A. Not if the res judicata aspects  
5 are unclear. And that's the great problem  
6 of both the definition of the class here and  
7 also the splitting of the cause of action  
8 issue.

9 MR. BRUNO:

10 Let's break.

11 MR. BROWN:

12 Off the record at 3:34:07.

13 (Whereupon a brief recess was  
14 taken at this time.)

15 MR. BROWN:

16 We're back on the record at  
17 3:41:48.

18 EXAMINATION BY MR. BRUNO:

19 Q. All right. Ed, I understand that  
20 your difficulty with regard to the  
21 territories and possessions and the  
22 commonwealth of Puerto Rico is primarily the  
23 possibility that there may be some  
24 differences in their law; correct?

25 A. Their law and the notice problem

1 seems to me exacerbated when you're thinking  
2 about giving notice abroad. It just causes  
3 additional management problems.

4 Q. Well, it's a matter of just how  
5 you do it and how much money you're willing  
6 to spend; right?

7 A. Yes.

8 Q. It can be done?

9 A. Yes.

10 Q. You can notify the world, if you  
11 spend the right amount of money; correct?

12 A. Yes.

13 Q. Let's talk about the choice of law  
14 stuff. Have you undertaken an analysis of  
15 the laws of the United States and its  
16 territories and possessions in the  
17 commonwealth of Puerto Rico to determine  
18 whether or not there are any differences  
19 with regard to the cause of actions asserted  
20 by the plaintiffs herein?

21 A. I haven't done a comprehensive  
22 survey of the laws of the 50 states as to  
23 all these issues. But in class actions that  
24 I've been involved in, I've come across a  
25 variety of matters concerning different

1 laws.

2 And it strikes me that there are  
3 considerable differences, both on the  
4 substantive elements of the causes of action  
5 and on the defensive issues and statute of  
6 limitations and on the remedial issues.

7 Q. Well, I'm just curious because you  
8 say that there are drastic differences with  
9 regards to the causes of action but I find  
10 that you see a great deal of similarity with  
11 regard to the defense, particularly as  
12 relates to reliance in a fraud case. So  
13 have you undertaken an analysis of the laws  
14 of all 50 states to make the determination  
15 that reliance is, in fact, a defense --

16 A. No.

17 Q. -- across these United States of  
18 America?

19 A. No, I haven't done a comprehensive  
20 account. But from what I've read, some form  
21 of reliance -- By the way, reliance may  
22 differ, also, from state to state in the  
23 exact quantum, in the degree and burden of  
24 proof in a number of matters. I'm not  
25 saying that they are identical. It's just

1 that, as far as I can tell, some form of  
2 reliance appears to still be the law across  
3 the country.

4 Q. All right. And it would be your  
5 view that it would be appropriate to do that  
6 analysis first?

7 A. Yes, I think -- I think that  
8 certainly a comprehensive analysis of the  
9 laws to determine what the differences are  
10 and whether they can be resolved in some  
11 fashion is going to have to be done at some  
12 point.

13 Q. All right. And that hasn't been  
14 done yet?

15 A. And I haven't done it. I haven't  
16 seen it done.

17 Q. Okay. All right. Now, certainly  
18 the issue of choice of law has been  
19 something that the courts have faced in the  
20 past; hasn't it?

21 A. Yes, it's --

22 Q. I'm sorry, in the context of class  
23 action litigation?

24 A. Of class actions.

25 Q. Yes.



1           A.       It's one of the reasons that we've  
2       seen so few nationwide classes that are not  
3       federal question class actions, because of  
4       that difficult job of knowing how to resolve  
5       the choice of law question.

6           Q.       All right. And, let's see, just a  
7       few more issues here. With regard to  
8       opt-out, that doesn't -- there need not be  
9       only one opt-out? There can be a series of  
10      opt-out opportunities; isn't that true?

11          A.       I suppose that a court could  
12      reopen -- Is that what you're suggesting,  
13      reopen the opt-out opportunity at some later  
14      time?

15          Q.       Yes. If you want to term it in  
16      that fashion.

17          A.       I suppose a court, in its  
18      discretion, could. I don't think a court --  
19      I think for lots of reasons, because we  
20      don't want -- we want to encourage parties  
21      to make a definitive judgment at a  
22      particular time because the cost of notice  
23      and administering opt-out are so expensive,  
24      I don't know that managerially it's very  
25      advisable to keep reopening it and

1        permitting opt-outs, but it is -- I suppose  
2        a court has some discretion in that area.

3            Q.        Well, again, that whole business  
4        of manageability, doesn't that require a  
5        weighing of really all the issues that we've  
6        talked about, the history of cigarette  
7        litigation, you know, all of the things that  
8        we've identified, the tactics, common issues  
9        and so forth, in order to really decide the  
10       issue? You can't really point to one  
11       specific issue and have that rule the day  
12       one way or the other; wouldn't you agree?

13           A.        Well, manageability, I think,  
14       particularly refers to whether the Court  
15       management, the structure of the suit and  
16       how the Court -- whether it's going to  
17       become an insurmountable burden for the  
18       Court over the next ten years in getting  
19       this through or not. That's the particular  
20       focus.

21                    The decision of whether to use a  
22       class action, whether it will achieve the  
23       efficiencies and economies that you hope,  
24       would also consider some of those other  
25       factors that you mentioned.

1 Q. Well, let me ask you if you agree  
2 with this sentence. And I'm taking this  
3 from a case which you selected to put in  
4 your book. And it is at Page 246. It says  
5 "Yet for a court to refuse to certify a  
6 class on the basis of speculation as to the  
7 merits of the cause or because of vaguely  
8 perceived management problems is counter to  
9 the policy which originally led to the rule  
10 and, more especially, to its thoughtful  
11 revision and also to discount too much the  
12 power of the Court to deal with the class  
13 suit flexibly in response to difficulties as  
14 they arise."

15 MR. McDERMOTT:

16 Would you clarify. Was that from  
17 a case?

18 MR. BRUNO:

19 That's what I said. It's from a  
20 case selected by Ed to put in his casebook  
21 and it appears at Page 246.

22 THE WITNESS:

23 What is the case?

24 MR. McDERMOTT:

25 Can you identify the case?

1 MR. BRUNO:

2 I can if you give me a second.

3 MR. McDERMOTT:

4 If you would like to take a look  
5 at the report, I'm sure he could --

6 EXAMINATION BY MR. BRUNO:

7 Q. Jack versus Powers.

8 A. Jack versus Powers.

9 Q. Would you like to look at the  
10 quote? Would that help you in determining  
11 whether or not you agree with it?

12 A. Let me take a look at that. Yeah,  
13 I think that this quote -- One has to be  
14 careful taking quotes out of context. The  
15 context in which it is placed is it's a  
16 civil rights (b)(2) lawsuit. There's a  
17 question of whether -- of a discovery  
18 question and whether there are manageability  
19 problems that would prevent -- rather small  
20 manageability problems, I might add -- so  
21 the appellate court found -- And I think the  
22 Court -- I don't think the Court is saying  
23 that you ignore manageability problems.

24 Q. I didn't suggest it did.

25 A. As a matter of fact, the Rule 23

1 clearly says that you must make that  
2 consideration. I think the Court is quite  
3 right, you don't just create paper tiger  
4 manageability problems and you don't say,  
5 well, we think ultimately the plaintiffs are  
6 not going to win on the merits and prevent  
7 class certification.

8 Class certification is not a place  
9 at which the merits are ultimately decided,  
10 although surely the relevance of whether you  
11 have a legally cognizable claim and it can  
12 be defined in a way that you can identify  
13 the class members and so forth is relevant.

14 There's some -- It's not that you  
15 have to, that the Court has to blind itself  
16 to anything having to do with the merits.  
17 It's just that the class certification stage  
18 is not the point at which you'd make the  
19 merits determinations.

20 Q. Certainly. In this particular  
21 case, one court viewed manageability as a  
22 problem and a higher court had an opposite  
23 view; right?

24 A. Yes.

25 Q. Fair?

1           A.       Yes.

2           Q.       So this whole business of  
3 manageability is really based on how the  
4 Court perceives its own power to handle the  
5 problems that the defendants may suggest are  
6 extant; right?

7           A.       And a court's own judgment of what  
8 is this going to do to my docket over the  
9 next five or ten years, if I'm going to have  
10 to have 50 million individualized trials on  
11 issues, how is it going to affect it, how  
12 can I manage it, can I use administrative  
13 measures to deal with it or not and so  
14 forth. The Court has to consider all those  
15 matters.

16          Q.       All right. And, now, finally,  
17 just, you know, based upon all that you know  
18 about the history of cigarette litigation, I  
19 just need to understand if it is truly your  
20 heartfelt view that the better course to  
21 proceed here is to have these four  
22 individuals try their claims from beginning  
23 to end as opposed to having these issues  
24 resolved class-wide?

25                   Again, knowing the history,

1 knowing that if you win, you haven't  
2 accomplished very much, and knowing how  
3 incredibly expensive it would be to proceed?

4 A. I don't put the trial of these  
5 four cases as the only alternative. What  
6 the alternatives are with this piece of  
7 litigation, I couldn't possibly set out  
8 right now. I think a lot is going to depend  
9 on events in the future.

10 If one of these cases, for  
11 example, went to trial and certain of the  
12 issues were Summary Judgmented out, and on  
13 appeal that was upheld, I think it would  
14 probably have a dramatic effect on not  
15 filing those actions or slimming down the  
16 causes of action.

17 I think that probably what happens  
18 with these four cases, where they go may be  
19 relevant. Whether those cases ought to  
20 ultimately be consolidated, whether there  
21 are going to be other cases with which they  
22 ought to be consolidated, whether a court  
23 ought to consider a bellwether or a test  
24 case, which by the way is much less  
25 cumbersome than a class action, in the

1 belief that a jury will decide these issues  
2 and that the parties will probably use that  
3 guidance in an informative way, I don't -- I  
4 can't say where it's going to go and what it  
5 will do.

6 I just know that the  
7 cumbersomeness of jumping into this class  
8 action with all its expense, all its  
9 problems, seems to me at this moment not to  
10 be warranted.

11 Q. You honestly think that if one  
12 plaintiff was successful against the  
13 cigarette manufacturers, given what you know  
14 of their history, that that would change  
15 their conduct one whit?

16 A. All I know is that probably the  
17 stance of the tobacco companies is very  
18 heavily based on their success in the past.

19 Q. I agree.

20 A. And the toughness of their stand  
21 is because they've been so successful. If  
22 they lose a case or a couple of cases or a  
23 consolidated case and there's some  
24 definitive rulings both on the law, I can't  
25 say what -- how they will react. But



1 parties have to react to what litigation  
2 experience tells them.

3 MR. BRUNO:

4 Okay. Ed, thank you very much.

5 THE WITNESS:

6 Certainly.

7 MR. BRUNO:

8 I turn the mike over to my  
9 colleague. And he promises not to ask any  
10 redundant questions, not one single solitary  
11 redundant question. I know, make your  
12 objections. Let's get set up first.

13 MR. BROWN:

14 Off the record at 3:53:55.

15 MR. McDERMOTT:

16 All right. Let me put our  
17 position on the record.

18 (Off-the-record discussion.)

19 MR. BROWN:

20 We're on the record at 3:56:22.

21 MR. McDERMOTT:

22 It is my understanding of the  
23 local rule that each party is permitted one  
24 examiner. The plaintiffs in this class  
25 action are a single party for these purposes

1 and it is our position that they're only  
2 entitled to one attorney asking questions.  
3 I don't know that tag team matches have been  
4 authorized by the Court. They certainly  
5 haven't been agreed to by the parties.

6 Nevertheless, since we finished  
7 reasonably early, in this instance and  
8 without raising -- without waiving any  
9 objection to cut it off or to take this up  
10 with the Court and certainly to assert in  
11 any future deposition, we will permit this  
12 questioning to go forward for a short time  
13 with the understanding that, one, it is  
14 limited in time; two, it is limited in  
15 scope; three, it isn't going to be  
16 repetitive in any respect.

17 So that is the basis upon which we  
18 are prepared to proceed.

19 MR. EBLE:

20 Well, I'm prepared to proceed.  
21 I'm not prepared to proceed with any  
22 limitations. I've stated my position. I  
23 won't be repetitive. I have no desire to be  
24 repetitive of questions that have been asked  
25 but I intend to ask my questions that I need

1 to ask while I'm here. So we'll just  
2 proceed and --

3 MR. DELACROIX:

4 Just for the record, could you  
5 state who you represent?

6 EXAMINATION BY MR. EBLE:

7 Q. I was preparing to do that.

8 My name is Tim Eble, Professor.  
9 I'm here on behalf of the plaintiffs, also.  
10 And I had some follow-up questions I wanted  
11 to ask you, following up the examination by  
12 Mr. Bruno. I don't believe I'll be nearly  
13 as long in duration as we've had so far.

14 This is an interesting position  
15 that we find ourselves in. You're  
16 testifying here today, I take it, as a legal  
17 expert; is that correct?

18 A. I don't think I've -- If by "legal  
19 expert" you mean an expert on the law, I'm  
20 not -- I'm not here for that purpose. I'm  
21 here to discuss the practical and  
22 manageability aspects of class actions, not  
23 to tell the Court what the cases say or what  
24 the law says.

25 Q. Well, when you talk about

1 look at this proposed class certification  
2 to, based on my experience with other cases  
3 and what I've read and thought about, to  
4 raise some of the problems.

5 And I would hope that it might be  
6 useful to a court, that I might have some  
7 insights. By and large, what I'm raising is  
8 not in the notion of a fixed opinion. It's  
9 much more that there are certain kinds of  
10 aspects and problems and considerations that  
11 I think a court's going to have to weigh  
12 when it makes the certification decision.

13 Q. Well, basically these insights, as  
14 you put them, are your opinions about what  
15 you perceive to be problems after you  
16 reviewed the documents; is that fair?

17 A. Well, insofar as I think that  
18 there are some problems, I guess that's my  
19 opinion as to there being problems. But  
20 that problem has a practical application.

21 Q. Are you aware of anybody or -- Let  
22 me ask you this. Have you ever testified  
23 about opinions on manageability and such as  
24 that before in a class action?

25 A. Yes, I have. The case that I

1 mentioned to Mr. Bruno, the Carter Wind  
2 Turbine case.

3 Q. You testified in that case as an  
4 expert?

5 A. As an expert.

6 Q. Were you a legal expert?

7 A. No, not a legal expert. Again, I  
8 testified to the Court on, solely on a  
9 certification issue, as to its manageability  
10 and the aspects of whether there were  
11 management mechanisms and so forth that  
12 would make it feasible for the Court to  
13 certify that case.

14 Q. Well, you would agree, would you  
15 not, that the decision whether the class is  
16 manageable, whether the class has common or  
17 typical aspects to it, whether the use of a  
18 class action as a superior device for  
19 adjudicating the controversy calls for a  
20 legal opinion; would you not?

21 A. Well, ultimately, I suppose that  
22 there are legal opinions as to this. And  
23 both parties have their own opinions.  
24 Ultimately, I think the judge is going to  
25 have to make a very practical determination,

1 weighing a whole lot of factors.

2 Some of those factors have been  
3 discussed in the cases, some of the factors  
4 haven't, some of the factors I perceive of  
5 from what I've thought about, and some of  
6 them I've seen from my experience with class  
7 actions.

8 But I'm just raising some  
9 considerations that may or may not be  
10 helpful. It's quite possible that the judge  
11 has complete discretion not to find them  
12 very useful. I just am trying to pick  
13 through what I think are some of the things  
14 that have to be thought about.

15 Q. Okay. We'll go on your past  
16 experience in just a few moments in more  
17 detail. But you would agree you're not an  
18 expert on medicine?

19 A. That's right.

20 Q. And you've offered opinions  
21 regarding the terms or conditions of the  
22 diagnosis or the interpretation of the  
23 medical condition of addiction during your  
24 deposition today; haven't you?

25 A. I don't think I have given

1       opinions, no.   What I've talked about is  
2       that the class that the plaintiffs have  
3       incorporated into the class definition are  
4       referenced to the DSMs, and that led me to  
5       the DSMs.   And the DSMs seem to be a  
6       compilation of medical, current medical  
7       thought about the addictive qualities of  
8       nicotine.

9               I'm not a medical expert.   I read  
10       them, and they appear to me to be quite  
11       subjective and quite diagnostic.   And they  
12       appear to me, therefore, to create a very  
13       strong necessity to have an individualized  
14       determination as to this matter.   I don't --  
15       It's not an opinion.   It's just that they've  
16       been incorporated into the definition and I  
17       went there to look at them.

18       Q.       Well, you would agree that  
19       propriety of their incorporation into a  
20       definition is a decision better left to a  
21       doctor as to what those criteria are;  
22       wouldn't you?

23       A.       Well, I can understand why  
24       plaintiffs chose to refer to them, because I  
25       think that there was a great deal of

1       vagueness as to what was nicotine dependence  
2       without them. And I can sympathize, and it  
3       does seem to me that they added clarity to  
4       the class definition.

5               The problem is they also add a  
6       very individualized kind of determination  
7       that makes it much more difficult, it seems  
8       to me, to give class-wide treatment to that  
9       particular question.

10       Q.       You would agree that the criteria  
11       for nicotine dependence is better left to  
12       doctors than to yourself; would you not?

13       A.       Oh, ultimately I suppose that,  
14       because I think this is an individualized  
15       issue, I suppose that medical testimony  
16       would be very relevant as to whether Class  
17       Member A or Class Member B or Class Member C  
18       is nicotine-dependent. I think that that  
19       medical evidence would be very relevant.  
20       And, indeed, if these cases are tried  
21       individually rather than in a class fashion,  
22       I would guess that medical evidence would be  
23       useful.

24       Q.       Well, let me ask the question  
25       again because I really don't believe you



1 understood the question or you didn't answer  
2 it. It's a very simple question. I didn't  
3 ask about certification, I didn't ask about  
4 issues. I said you would agree that the  
5 criteria for determining nicotine dependence  
6 is better left to doctors than to yourself;  
7 is that a fair statement?

8 A. I'm not providing any criteria  
9 myself. I've looked to the DSM because it  
10 was incorporated by the plaintiffs. If the  
11 DSM is a good indication of what a doctor's  
12 view is -- and I don't know that it is, it's  
13 promulgated by the medical society but I  
14 don't know if it is -- then, of course, it's  
15 a reflection of how doctors would view it  
16 and, ultimately, doctors view it.

17 Certainly, I am no expert at  
18 saying that any individual is nicotine-  
19 dependent or not.

20 Q. I'll move to strike. I don't  
21 believe the answer is responsive. It's a  
22 very simple question. Maybe I can ask it  
23 again. You would agree that the criteria  
24 for determining nicotine dependence is  
25 better left to physicians than to yourself;

1 is that a fair statement or not?

2 A. It's not a question I can answer  
3 in that form. The Court is going to have to  
4 determine nicotine dependence because the  
5 class is defined with that term. It's not  
6 for me to define that, it's not for doctors  
7 to define it. The Court has to determine  
8 whether that has some significance.

9 Ultimately, yes, I think that  
10 probably in deciding that in each individual  
11 case, one will have to refer to the medical  
12 knowledge.

13 Q. In asbestos cases, did you know  
14 that there are subjective criteria that are  
15 employed in the determination as to whether  
16 a person has asbestosis or not?

17 A. I would guess that there are  
18 probably some subjective criteria; but I  
19 think that probably most of the five  
20 asbestos-related diseases, there are overt  
21 manifestations that are easily  
22 identifiable. And it's not the sort of  
23 subjective criteria like anxiety and anger  
24 that we find in the DSMs.

25 Q. Well, is dyspnea a subjective

1 criteria?

2 A. I don't even know what that is.

3 Q. Is fatigue a subjective criteria?

4 A. Fatigue is a more subjective  
5 criteria, that's right.

6 Q. Do you know that those are  
7 elements that a physician looks to in a case  
8 involving asbestos disease to determine  
9 whether an individual is harmed by asbestos?

10 A. I wouldn't guess that those are  
11 the only criteria.

12 Q. I said those are among the  
13 criteria.

14 A. Well, yes. But those five  
15 diseases have much more objective  
16 manifestations, as far as I can tell, than  
17 what is called a nicotine dependence.

18 Q. Tell me what the five diseases  
19 are.

20 A. Well, I'm not sure that I can name  
21 all of them for you. They've been referred  
22 to in many cases. In fact, in the Cimino  
23 case, Judge Parker divided the class up into  
24 those five disease categories.

25 Q. Would you agree that in

1 determining the merits of a plaintiff's  
2 claim, the criteria that would be testified  
3 to by a physician as to whether an  
4 individual does or does not have a disease  
5 would often involve subjective criteria?

6 A. Yes, I think some subjective  
7 criteria are probably present in most  
8 medical diagnoses.

9 Q. And asbestos cases have been  
10 certified and treated for class action  
11 disposition; have they not?

12 A. Yes.

13 Q. Incidentally, have you ever tried  
14 an asbestos case?

15 A. No, I haven't. I have, I ought to  
16 say, served as a court-appointed mediator in  
17 a -- to attempt to mediate 25 asbestos  
18 cases. And I dealt for a couple of days in  
19 a mediator's role with those cases, but I  
20 have not myself served as counsel.

21 Q. We talked about Cimino versus  
22 Raymark Industries. Were you counsel of  
23 record in that case for any party?

24 A. No, I was not involved in that  
25 case.

1 Q. All right. You weren't appointed  
2 by the Court in that case to act as a  
3 special master; were you?

4 A. No, I wasn't.

5 Q. In Re: Fibreboard, were you  
6 counsel of record in In Re: Fibreboard?

7 A. No.

8 Q. We talked about the Jenkins case.  
9 Now, all these cases I'm talking about are  
10 Texas cases so far, aren't they --

11 A. Yes.

12 Q. -- Cimino, Jenkins? Were you  
13 counsel in Jenkins?

14 A. No.

15 Q. Have you been counsel in the  
16 national class actions certified in Beaumont  
17 as Ahearn or Rudd, which are national class  
18 actions?

19 A. No.

20 Q. In the State of Texas can you give  
21 me -- And you've been in Texas for 17 years;  
22 correct?

23 A. Right.

24 Q. Can you give me a single reported  
25 decision involving a class action in the

1 State of Texas where you appear in the  
2 decision as counsel of record?

3 A. There have been no reported  
4 decisions in which I've been counsel of  
5 record. By the way, if this is relevant to  
6 your prior questions, I have a great deal of  
7 familiarity with some of the cases you just  
8 mentioned, particularly Cimino and Jenkins,  
9 because I've spent some time talking with  
10 the special master who was Jack Ratliff,  
11 I've spent a good deal of time talking to  
12 Judge Parker and some time talking to  
13 counsels on various -- reading pleadings and  
14 so forth, but I was not counsel.

15 Q. In Cimino, I think you  
16 mentioned -- How many appeals were there in  
17 Cimino?

18 A. Well, there's never been an appeal  
19 in Cimino. There was a mandamus action to  
20 the Fifth Circuit which mandamused Judge  
21 Parker, and they mandamused him and he  
22 withdrew his trial plan.

23 Q. Well, I just filed a brief two  
24 weeks ago in Cimino in an appeal.

25 A. Well, it was sent -- it may be on

1 appeal right now. It was sent back, he  
2 altered his trial plan, and then it was  
3 tried. And I don't know what the appellate  
4 status is. It may be pending now.

5 Q. In Re: Fibreboard is a case you  
6 mentioned. Now, that didn't concern the  
7 rights of the individual plaintiffs at all;  
8 did it?

9 A. Are you referring to the mandamus  
10 action in In Re: Fibreboard?

11 Q. Correct.

12 A. That was the mandamus action that  
13 was connected, as I understand it, with the  
14 Cimino case after Judge Parker had  
15 promulgated his trial plan, it went up on  
16 this mandamus action called In Re:  
17 Fibreboard.

18 Q. I thought you mentioned earlier  
19 that one of the reasons that the Fifth  
20 Circuit sent Fibreboard down was because it  
21 was a need to reemphasize the rights of the  
22 individuals; is that fair?

23 A. Well, what the Fifth Circuit said  
24 in Fibreboard was that issues of -- that  
25 under Texas substantive law, issues of --

1 the various elements, the cause of action,  
2 including causation, had to be decided  
3 individually. And that Judge Parker's  
4 attempt to resolve the case by taking some  
5 sample cases and trying them and then  
6 reaching an average verdict that applied to  
7 other class members was impermissible.

8 So I was referring to the language  
9 there that they particularly invoked a Texas  
10 substantive law and the Erie doctrine and  
11 saying the federal court was obligated to  
12 give effect to Texas substantive law; and  
13 that what were involved there were the  
14 rights of the parties to have an  
15 individualized determination of these  
16 issues.

17 Q. Well, Fibreboard, though, that's  
18 not what Judge Parker intended to do; was  
19 it? Under Jack Ratliff's original plan,  
20 wasn't there to be a summarization of the  
21 medical testimony of all of the class, which  
22 would be presented by experts under the  
23 Trial Plan 1, and then that would be then  
24 later placed into various categories of  
25 disease for compensation levels? Isn't that



1        what Trial Plan 1 called for?

2            A.        Well, the summarization, if I  
3        remember it correctly -- it's been a while  
4        since I've read the rather detailed plan --  
5        was one aspect of it. The principal aspect  
6        was that Judge Parker had selected -- had  
7        decided that he would -- he allowed, as I  
8        recall, the parties to each select like 15  
9        cases each, and then I believe he took the  
10       cases of the class representatives and he  
11       said he would try those individually.

12                    And from those trials, he would  
13       extrapolate a jury verdict that would  
14       apply -- He divided the class up into five  
15       disease categories, and he would take  
16       averages within those disease categories and  
17       then apply them to the class members. And  
18       along with that, he had the summarization  
19       that after the jury verdicts came in, some  
20       sort of summarization would take place.

21                    That was really secondary to the  
22       use of these test cases from which they  
23       would be extrapolated. That's what the  
24       Fifth Circuit slapped him down on. They  
25       said that these cases had to be tried

1 individually and he couldn't use that  
2 method.

3 Q. Well, I differ with you a little  
4 bit on your interpretation of what  
5 happened. But actually what happened when  
6 the case came down was all of the cases were  
7 eventually resolved in Trial Phase 1 on  
8 issues of liability involving over two  
9 thousand plaintiffs; correct?

10 A. Now you're talking about after it  
11 was remanded?

12 Q. After it was remanded.

13 A. Well, after it was remanded, Judge  
14 Parker revised his plan. And this time,  
15 instead of having the parties select out  
16 their cases, he relied upon social science  
17 techniques, of really upholding techniques.  
18 He did random selection within the five  
19 disease categories of cases. And he  
20 justified it in his order on the grounds  
21 that a high degree of statistical certitude  
22 could be accorded to these cases.

23 Q. I'm talking about Trial Phase 1.  
24 I think you're talking about something  
25 different. The case that came down in Trial

1 Phase 1 was tried according to Jenkins, was  
2 it not, on issues of liability and punitive  
3 damages?

4 A. In Jenkins?

5 Q. In Cimino.

6 A. Pursuant to -- Following the  
7 Jenkins model, I guess.

8 Q. Okay. Do you recall that there  
9 were more than one -- You know that there  
10 was more than one phase?

11 A. Yes, I remember that now. I guess  
12 maybe there was a Phase 1 in which they  
13 tried certain common issues.

14 Q. So a class of over two thousand  
15 people had issues common to liability and  
16 punitive damages resolved for the whole  
17 class in Phase 1; is that correct?

18 A. I don't think all of the --

19 Q. If you know.

20 A. -- all of the issues of liability  
21 were resolved there. But I think that's  
22 right, I think they focused on the  
23 defectiveness of the products as well as the  
24 presence of the products in the job areas  
25 and punitive damage issue. It was

1 essentially the Jenkins model that he  
2 followed. You're quite right, I think that  
3 was Phase 1 of Cimino.

4 Q. Do you know whether the liability  
5 for the entire class was resolved in one  
6 unitary trial in Cimino? Do you know the  
7 answer?

8 A. I'm not sure about that. As to  
9 whether all the liability issues were  
10 determined or not.

11 Q. Were you aware if punitive damages  
12 was determined in Phase 1?

13 A. Yes. But --

14 Q. Okay. Now, do you know what  
15 happened in Phase 2 of Cimino, how the Phase  
16 2 was tried? They took 160 representative  
17 cases; did they not?

18 A. Well, they were not representative  
19 cases. They were randomly selected. And  
20 that was the important difference. He  
21 didn't evaluate the cases and say, "This is  
22 representative of other cases." They were  
23 randomly selected and, therefore, you had  
24 statistical verifiability for it.

25 Q. Also, they took biostatistical

1 evidence through biostatisticians and  
2 epidemiologists regarding after the 160  
3 cases were tried?

4 A. I think that's right.

5 Q. That those values were applied  
6 class-wide in the aggregate, how those  
7 values would apply to individual class  
8 members, class-wide giving the consideration  
9 of individual defenses that would be  
10 considered in Phase 1, and they found an  
11 accuracy level of that for class-wide  
12 damages of 99 percent confidence or greater?

13 A. Well, that was the social science  
14 testimony by experts. And that it indicated  
15 that confidence level.

16 Q. Now, you would agree, would you  
17 not, that the Cimino model could be applied  
18 in other mass tort circumstances?

19 A. It might in some other mass tort.  
20 I think it's entirely inappropriate in this  
21 case. And I'll give you the reasons why, if  
22 you'd like me to.

23 Q. I didn't ask you about this case.  
24 I'm asking you questions and you're  
25 answering other questions.

1           A.       Well, I'm telling you I think it  
2 has no applicability to this case.

3           MR. McDERMOTT:

4                    You can move to strike or  
5 disregard. Let the witness answer.

6 EXAMINATION BY MR. EBLE:

7           Q.       Well, I move to strike as  
8 nonresponsive. I'm trying to cut back on  
9 our time to be here is all I'm trying to  
10 do. I'm not trying to tell you how to  
11 answer. But if it takes five minutes to  
12 answer a question that can be answered with  
13 "Yes" or "No," that's going to be five  
14 minutes more on the deposition.

15           A.       The questions are going to have to  
16 be phrased in a way that I can answer "Yes"  
17 or "No" without explaining my answer.

18           MR. McDERMOTT:

19                    If you need to complete your  
20 answer to the previous question, go ahead,  
21 Professor Sherman.

22           THE WITNESS:

23                    Okay. Your question is whether  
24 Cimino can be applied to other mass tort  
25 cases. And let's make a couple of

1       distinctions.   The second phase that we've  
2       been talking about, that is, the use of  
3       sampling techniques for selecting cases and  
4       the extrapolation of jury verdicts from that  
5       is highly controversial.

6               It's never been passed on by a  
7       court.   There have been a host of Law Review  
8       articles about this.   It's a very  
9       interesting, creative approach.   I have no  
10      idea whether it will hold up on appeal.  
11      It's much debated.   And whether that kind of  
12      technique is going to be available or not, I  
13      think, will depend very much on what happens  
14      to this appeal, if it is appealed.

15             I had heard that settlement was  
16      going on and so I didn't -- I wasn't sure  
17      whether it would ever be decided on appeal.  
18      But if you indicate there's an appeal going  
19      on, then we may decide it.

20             Now, the first phase that we  
21      talked about, there is nothing terribly  
22      remarkable about Cimino because I think that  
23      essentially Cimino followed Jenkins.   And  
24      that is just like Jenkins, Judge Parker  
25      said, "We have a finite number of cases

1 here. The exposure is very similar. There  
2 are -- The defensive issues are very minor.  
3 There are really not questions of assumption  
4 of risk because these were people who were  
5 exposed in the workplace who did not know  
6 that the product -- that the asbestos  
7 products were there." There were not really  
8 questions of comparative negligence because  
9 there was no question of the negligence of  
10 the parties.

11 Given the lack of the  
12 individualized issues, both Jenkins and then  
13 Cimino followed that in Phase 1, used a  
14 class action Phase 1 trial. And in  
15 similar -- I would put that kind of case  
16 somewhere in the middle on my continuum.  
17 That's a manageable class action trial. And  
18 if another kind of case arises with some of  
19 the same history of asbestos litigation and  
20 a very small number of individualized  
21 issues, it might well be applied.

22 Phase 2 is completely up in the  
23 air. I thought it was a very interesting  
24 device, but we'll just have to see what the  
25 Fifth Circuit does with it.



1 EXAMINATION BY MR. EBLE:

2 Q. Well, Phase 2 was actually  
3 stipulated to by the parties. Phase 3, is  
4 it your testimony that Phase 3 did not  
5 involve the consideration of any individual  
6 defenses such as assumption of risk or --

7 A. Well, I don't know if I've got the  
8 right names. It's been a long time since  
9 I've looked at it. Are you saying Phase 3  
10 was the sample cases?

11 Q. Correct.

12 A. Okay. Well, then, it's Phase 3  
13 that I'm referring to.

14 Q. Talking about the areas that you  
15 testified to here today, I believe you  
16 indicated that you're not an expert on the  
17 law of the territories of the United States?

18 A. That's right.

19 Q. And you're not an expert on the  
20 variations, if any, in the consumer  
21 protection statutes among the various United  
22 States?

23 A. I'm not an expert but I'm not  
24 unfamiliar with the consumer protection  
25 statutes. I've read some of them and I've

1       dealt with the Texas ones. And I know that  
2       there are some very, very different  
3       provisions from one state to another.

4           Q.       Now, I believe you said you're not  
5       an expert, that you haven't studied the  
6       choice of laws problems in any detail among  
7       the 50 various United States; is that fair?

8           A.       I haven't done a comprehensive  
9       study of how the 50 states come out on each  
10      one of these issues that we've been talking  
11      about. Perhaps a dozen different issues.  
12      I'm not unfamiliar with these. I've seen  
13      these issues in cases I've dealt with and in  
14      class actions. But I've done no  
15      comprehensive review.

16          Q.       Can you tell me the cases where  
17      your name appears as counsel of record that  
18      have been reported in federal court that  
19      involve a class action?

20          A.       I don't think there have been any  
21      reported cases.

22           MR. McDERMOTT:

23                    I believe that is repetitive.

24           THE WITNESS:

25                    I think I testified to that.

1 MR. EBLE:

2 I asked about state court earlier,  
3 now I'm asking about federal court.

4 MR. McDERMOTT:

5 I think your prior counsel asked  
6 about any reported cases, which I took to  
7 encompass both state and federal. Making  
8 two follow-up questions instead of one  
9 doesn't seem to me markedly improves the  
10 situation. But let's carry on.

11 MR. EBLE:

12 Let's go off the record.

13 MR. BROWN:

14 Off the record at 4:25:11.

15 (Whereupon a brief recess was  
16 taken at this time.)

17 MR. EBLE:

18 Let's go back on the record.

19 MR. BROWN:

20 We're back on the record at  
21 4:28:52.

22 EXAMINATION BY MR. EBLE:

23 Q. Professor, we asked about reported  
24 opinions. And I haven't read your textbook,  
25 but were you counsel of record in any of the

1 cases that are published in your textbook  
2 either in 1985 or 1992?

3 A. No.

4 Q. Are you on the editorial boards  
5 for any Class Action Reporters that go out  
6 to practicing lawyers and judges?

7 A. No.

8 Q. I mentioned -- You mentioned  
9 earlier in connection with ADR proceedings  
10 that you had written some things on ADRs and  
11 mentioned class actions. Are you aware of  
12 the fact that the ADR, as it attempted to  
13 resolve asbestos litigation in the State of  
14 Texas, was considered a failure by Judge  
15 Parker?

16 A. Oh, yes, I know. He attempted it  
17 to do that and it wasn't very successful.

18 Q. And as a result of the failure of  
19 the ADR, he went back to the class action  
20 method; didn't he?

21 A. Well, his initial attempt was to  
22 use ADR along with some aggregative  
23 techniques. And, ultimately, he went to a  
24 class action, that's right.

25 Q. Have you ever heard of anyone

1 being paid by tobacco companies voluntarily  
2 through an ADR proceeding?

3 A. I don't know of -- I'm not  
4 intimately familiar with all the tobacco  
5 cases but I don't know of any settlement, if  
6 that's what you mean.

7 Q. In your early literature when you  
8 were at Indiana University and before you  
9 went to Texas, you published articles that  
10 discussed, among other things, the burden  
11 placed upon the judicial system by  
12 duplicative litigation when cases are tried  
13 on an individual basis; correct?

14 A. Right.

15 Q. Now, if you take Cimino, for  
16 instance, do you recall Judge Parker's  
17 statement about what would happen to the  
18 judicial system if each of those 2,298 cases  
19 had to be tried on an individual basis, as  
20 to how long that would take?

21 A. Well, he had a statement that --  
22 I've forgotten how many years. It was quite  
23 a number of years. And I think that his --  
24 I think this had a lot to do with the Fifth  
25 Circuit approving the class action device;

1       that this was a real crisis situation in  
2       which a large number of asbestos cases were  
3       present, they weren't going away and they  
4       weren't getting tried.

5           Q.       You would agree, if there are tens  
6       of thousands or even a million individuals  
7       out in the United States who have been  
8       addicted to nicotine, that if they were to  
9       file each and every case individually, that  
10      the system would not be able to handle that  
11      kind of a load?

12          A.       Oh, I suppose if there were a  
13      million cases by people claiming emotional  
14      injuries for nicotine addiction, there would  
15      be quite a caseload. The question, of  
16      course, there's no evidence that that exists  
17      right now. And, of course, we're dealing  
18      with -- not with serious asbestos cases in  
19      which people had clear physical, serious  
20      physical injury, but we're dealing with a  
21      rather intangible notion that there will be  
22      emotional harm deriving from having been  
23      nicotine-addicted. So it's not quite the  
24      pressing case as the others.

25                   But, yes, if lots of these cases

1 get filed, there will be a problem. Of  
2 course, these cases might not get filed if  
3 certain kinds of issues are decided certain  
4 ways in the early litigation.

5 Q. Well, you would agree that  
6 emotional damages constitutes a type of  
7 physical harm, and the criteria for  
8 determining whether a person is addicted are  
9 medical questions; correct?

10 MR. McDERMOTT:

11 Object. Compound question.

12 EXAMINATION BY MR. EBLE:

13 Q. Both of those are medical  
14 questions; correct?

15 A. Well, your first question was  
16 whether emotional harm constitutes a  
17 physical condition?

18 Q. Injury.

19 A. And I don't know how a doctor  
20 would classify that regarding a physical  
21 condition as opposed to some kind of  
22 psychological impact. I don't know that  
23 emotional harm from addiction has,  
24 necessarily has physical manifestations.  
25 But it's much less physically determinative

1       than physical injuries.

2                   And I've forgotten, the second  
3 question was?

4           Q.       That if -- Actually, the second  
5 question was a clarification of the first  
6 question and I believe you did answer it.

7           A.       All right.

8           Q.       Class actions that involve  
9 millions of potential plaintiffs are not  
10 unprecedented in the United States judicial  
11 system; are they?

12          A.       Well, I can't -- I can't recall  
13 million-member class actions. There have  
14 been some big class actions, like big  
15 antitrust class actions; Corrugated  
16 Container case, for example, that involved a  
17 couple of hundred thousand potential class  
18 members.

19                   There have probably been some  
20 consumer class actions in which the  
21 managerial problems are quite minimal  
22 because once you determine that there's been  
23 a rate overcharge, you can use a mechanical  
24 formula to do it. But I'm not familiar with  
25 class actions in the million levels.



1 Q. Well, have you ever heard of the  
2 airline pricing antitrust class action?

3 A. Yeah, I have. And I don't know  
4 how -- I've never known how many people  
5 might be involved in that. There was a  
6 settlement, a proposed settlement, in that  
7 class action and I don't know where that  
8 class action is now.

9 Q. If that class action involved air  
10 travelers from multiple major airlines for a  
11 period of years, you would agree it likely  
12 would involve millions of people; wouldn't  
13 you?

14 A. It was a lot of people. I just  
15 don't know the total number.

16 Q. Earlier you testified that the  
17 decision whether to certify a class action  
18 is a momentous decision. What did you mean  
19 by that?

20 A. Well, a class action is a --  
21 changes the course of the litigation very  
22 dramatically. The Court now empowers the  
23 representative plaintiffs and their  
24 attorneys to represent a whole group of  
25 absent class members. They take on

1       fiduciary duties to those class members, the  
2       Court takes on responsibilities of  
3       monitoring, the action can't be settled  
4       without the full approval of the Court.

5               You're now talking not about a  
6       suit involving the -- just the named  
7       plaintiffs but you're talking about the  
8       thousands or however many class members  
9       there are. And somehow it will have to --  
10      If relief is granted, you'll have to find a  
11      way to deal with that. It may affect  
12      discovery. It's --

13             By the way, it's not always a  
14      momentous decision. There are -- There have  
15      been small class actions, there have been  
16      class actions for as few as 40 people, which  
17      are fairly straightforward and managerial  
18      problems are quite minimal. But if you're  
19      talking about -- I think there's no doubt  
20      that this class action is a momentous  
21      decision. It's taking on -- It's taking on  
22      a managerial responsibility for a decade, I  
23      would guess, in the future.

24             Q.       Many of the factors that you  
25      described exist, whether it's certified or

1 not certified, exist from the date of  
2 filing; correct? When you file a class  
3 action complaint, you assume a fiduciary  
4 relationship to the class from the minute  
5 it's filed; is that a fair statement?

6 A. Well, there are some  
7 responsibilities because, for example, it  
8 tolls the statute of limitations for the  
9 class members, even though it's not yet  
10 certified. And there are some  
11 responsibilities that take place, yes.

12 Q. Well, you have a fiduciary  
13 relationship when you file it. You can't go  
14 out and dismiss the case without judicial  
15 approval after it's filed even though it's  
16 not certified; right?

17 A. I guess that's right, yes.

18 Q. And it's federal court policy, is  
19 it not, to liberally grant certification of  
20 a class conditionally in the event there's  
21 any question about the propriety because  
22 such a decision is continually reviewable  
23 and subject to change by the Court at any  
24 time?

25 A. No, I don't think it is a federal

1 court policy to grant it liberally. Courts  
2 can conditionally certify class actions, but  
3 that's done only after a full consideration  
4 of the Rule 23 factors and a very reasoned  
5 and careful determination of what the  
6 Court's getting into.

7 Q. Well, if the Court certifies it  
8 and they later find they're getting into  
9 something they don't want to be involved in  
10 or it becomes apparently unmanageable, then  
11 they can decertify a class at any time;  
12 can't they?

13 A. Well, decertifying and pulling out  
14 is not that easy in most cases. A class  
15 action, once certified, begins a process  
16 that one doesn't just pull out of and  
17 alter. It's altered process.

18 Now, there may be cases in which  
19 classes have been certified and very little  
20 has been done, no progress has been made,  
21 and it can be decertified, and all that's  
22 lost is some time. But if a class action  
23 goes forward according to a case management  
24 plan of the kind that the CJRA requires of  
25 courts to do these days, then I think

1 decertification down the line is -- has many  
2 complications.

3 Q. Let me ask you the question again  
4 in a different way. Do you know whether a  
5 federal judge has the power to decertify a  
6 class after certification if he finds that  
7 circumstances change or the class becomes  
8 apparent that it's going to be unmanageable?

9 A. Yes, he does.

10 Q. One of the questions that you  
11 raised or one of the issues you raised about  
12 notice was it would be difficult to get  
13 notice to the class members; is that what  
14 you testified to?

15 A. I think it's quite a challenge  
16 here to determine how you're going to give a  
17 fairly succinct notice to the class members,  
18 given the fact that the laws of 50 different  
19 states are likely to apply and there are a  
20 whole lot of individualized issues and  
21 there's a real preclusion splitting your  
22 cause of action problem.

23 Q. Have you ever been counsel in a  
24 national class involving personal injury  
25 that was certified anywhere in the United

1 States at any time?

2 A. No.

3 Q. Are you aware of national class  
4 actions that have been certified in the  
5 United States that involve personal injury?

6 A. Yes, a few have.

7 Q. Can you tell me specifically which  
8 ones you are aware of having been certified?

9 A. Well, ones that come to mind are  
10 the In Re: asbestos school litigation. One  
11 of the most nightmarish of class actions, by  
12 the way. It's been pending for more than  
13 ten years. It's generally considered to  
14 have been a failure. There's a nationwide  
15 class action that's been certified in an  
16 asbestos college case. I think the Ahearn  
17 case that you referred to was a nationwide  
18 class action but, if I'm not mistaken, it  
19 was certified on settlement, which makes it  
20 much, much easier.

21 There have been several nationwide  
22 class actions certified on settlement, which  
23 really avoids lots and lots of the problems  
24 that we're talking about here. If the  
25 parties want to avoid choice of law

1 questions through settlement in a nationwide  
2 class action, they can do so.

3 Q. What published literature or case  
4 did you refer to or are there any that you  
5 can refer to that says the school asbestos  
6 litigation is a failure?

7 A. The Law Review article by  
8 Professor Roger Transgrud refers to that.

9 Q. And what was the date of that Law  
10 Review article?

11 A. Oh, maybe six years ago. I think  
12 you'll find it cited in my article in the  
13 Review of Litigation.

14 Q. Did he talk about how many  
15 settlements have come out of the school  
16 asbestos litigation?

17 A. I don't recall that he did.

18 Q. Do you know how many millions of  
19 dollars in settlements have come through the  
20 school asbestos --

21 A. Something I read indicated that 40  
22 million -- there have been 40 million  
23 dollars of settlements. It seems to me a  
24 very small number, in fact, given the scope  
25 of that litigation.

1 Q. Have you ever heard of a case  
2 called Wadleigh versus Rhone-Poluen Blanc?

3 A. Yeah, I've run across that case  
4 but I don't remember very much about it.

5 Q. What's it involve?

6 A. I don't -- I can't tell you. I  
7 just remember the name.

8 Q. That was certified last week;  
9 wasn't it?

10 A. That, I didn't know.

11 Q. It involved personal injury;  
12 correct?

13 A. I will take -- I don't know.

14 Q. Have you ever heard of Bowling  
15 versus Pfizer?

16 A. What was the nature of that class  
17 action?

18 Q. Are you aware of what the nature  
19 of that case was?

20 A. No, I'm not.

21 Q. That's a personal injury class  
22 action involving claims, among others, for  
23 emotional distress and implanted heart  
24 valves that was filed in the Southern  
25 District of Ohio.



1           A.       Yeah, I've heard that that's  
2 pending but I don't know -- I don't have any  
3 personal knowledge of that case.

4           Q.       Have you ever heard of In Re:  
5 Fernald litigation?

6           A.       Yes. In fact, if I'm not  
7 mistaken, that case was cited by the  
8 plaintiffs in this case.

9           Q.       That case involved emotional  
10 injuries; did it not?

11          A.       It did. I don't recall that it  
12 provided that they could be tried on a  
13 class-wide basis.

14          Q.       Well, it settled, so there never  
15 was a trial.

16          A.       Yeah.

17          Q.       Have you ever heard of a case  
18 called Georgine versus AC&S, et al?

19          A.       I guess is that the asbestos class  
20 action that's pending up in Baltimore, is  
21 it?

22          Q.       Philadelphia.

23          A.       Philadelphia. Yeah, I've heard  
24 about it, yes.

25          Q.       That case, did you know that case

1 was finally certified, given final  
2 certification?

3 A. As a settlement class, if I'm not  
4 mistaken.

5 Q. And it resolved the claims of over  
6 a hundred thousand pending and future  
7 asbestos-related injuries; did it not?

8 A. When the parties are able to  
9 settle these classes, they can resolve many  
10 of the difficult managerial problems.  
11 Courts -- Nationwide class actions,  
12 settlement class actions are simply not the  
13 same kind of animal that we're talking about  
14 here.

15 Q. Well, there were over a hundred  
16 thousand cases pending against CCR before  
17 that case settled; weren't there?

18 A. Yes. And through the settlement  
19 agreement, I've read through that settlement  
20 agreement which comes up with a matrix and a  
21 chart and indicates that the class members  
22 will receive different payments according to  
23 a formula. That's all achievable in a  
24 settlement class. That's probably not  
25 achievable in a class -- in a case that goes

1 to trial.

2 MR. BROWN:

3 Excuse me, sir. I have a tape  
4 change. Changing to Video 4 at 4:46:38.

5 This is the head of Video 4  
6 continuing the deposition of Edward  
7 Sherman. On the record.

8 EXAMINATION BY MR. EBLE:

9 Q. Does the Texas State Board for  
10 lawyers have certifications?

11 A. For specializations?

12 Q. Correct.

13 A. Yes.

14 Q. Among those certifications would  
15 be certification as a personal injury trial  
16 attorney in the State of Texas?

17 A. Yes, Trial -- I've forgotten what  
18 you call it, Trial Specialist or something  
19 like that.

20 Q. And there's a certification as a  
21 civil trial lawyer in the State of Texas,  
22 too; correct?

23 A. That's right.

24 Q. Are you certified under either of  
25 those Board certifications under the laws of

1 the State of Texas?

2 A. No, I'm not.

3 Q. Were you asked to review the draft  
4 edition of the Manual for Complex Litigation  
5 3d?

6 A. I think that I was sent a copy of  
7 a draft. I can't tell you exactly where.  
8 I'm on the mailing list of a couple of  
9 things. I get sent things from Judge  
10 Schwarzer that come out of the federal  
11 judicial center for review. And if I'm not  
12 mistaken, somewhere along the line I got a  
13 copy of that draft. But I can't tell you  
14 for certainty.

15 Q. Did you go to the conference in  
16 Philadelphia where a two-day discussion was  
17 held with Judge Schwarzer, Judge Pointer,  
18 judges from the State of Texas and elsewhere  
19 where the revisions that were pending or  
20 under discussion or consideration to the  
21 Manual for Complex Litigation 3d were  
22 basically aired and discussed?

23 A. No, I didn't attend that  
24 conference. It sounded interesting. I wish  
25 I could have but I wasn't able to.

1 Q. Are you familiar with the case  
2 called Day versus NLO?

3 A. Yeah, but you're going to have to  
4 jog my memory about it.

5 Q. Do you recall where it was  
6 pending?

7 A. No. Is that --

8 Q. Nuclear exposure case.

9 A. Nuclear exposure.

10 Q. Do you recall that?

11 A. I don't remember enough to discuss  
12 it, no, I'm sorry.

13 Q. You're not splitting the cause of  
14 action, are you, if a judge -- And it's  
15 clear under the Federal Rules, is it not,  
16 that if a judge certifies issues under  
17 23(c)(4) for disposition, that that in no  
18 way is a res judicata on other issues?

19 A. Well, if what you mean is that a  
20 judge certifies a class for some issues and  
21 then has mini trials or individualized  
22 trials for the other issues, certainly  
23 that's not splitting the cause of action.

24 Q. Well, what I'd like for you to do  
25 is to give me one case in the history of

1 American jurisprudence that says when an  
2 issue is tried pursuant to a class, where  
3 the issue is certified under 23(c)(4), that  
4 that acts as res judicata on other claims  
5 that that class member may have?

6 A. I can't give you the names of  
7 cases right now, although it's my  
8 impression -- I don't know whether this  
9 actually has come up. I don't think there's  
10 much doubt that certification of a class  
11 action on certain claims and then a suit  
12 filed -- You're talking now about an  
13 independent suit filed some time later, not  
14 the resolution of individualized issues in  
15 the same case. That's -- there's no res  
16 judicata problem there.

17 I'm talking about the  
18 certification of certain claims arising out  
19 of the same transaction and then, at some  
20 later time, the class member coming along  
21 and suing for other claims arising out of  
22 that identical transaction. I don't think  
23 there's much doubt under res judicata law in  
24 most of our states that that would be  
25 precluded.

1           Q.       If the issue is certified under  
2       23(c)(4), can you tell me -- you came in and  
3       you testified to that under oath, so you  
4       obviously had a basis for it. So, surely,  
5       there must be one case somewhere in the  
6       United States that says that if an issue is  
7       certified under 23(c)(4) -- now, I know  
8       there's cases that talk about splitting  
9       causes of action. But I'm talking about one  
10      case that says if a judge certifies an issue  
11      like that, that that acts as res judicata on  
12      other claims.

13               And the reason I asked you that is  
14      because there's been umpteen class actions  
15      involving asbestos where people were  
16      certified on a national basis, and that  
17      never was construed to bar any claim they  
18      had for any future claim that they had  
19      against any other defendant. So I'm trying  
20      to find out what it was specifically that  
21      you can point to as a case that I can pull  
22      out in the casebook that says that.

23           A.       Well, I don't know that it's  
24      ever -- that it's ever -- that that issue  
25      has ever arisen but I can't tell you that it

1 hasn't. I haven't done a comprehensive  
2 search on that. I'd be willing to do that.  
3 But my reading of the res judicata cases  
4 would indicate that that's not going to  
5 prevent the splitting of cause of action.

6 Q. Well, have you read Rule 23(c)(4)  
7 and the advisory committee notes and the  
8 case law that interpret Rule 23(c)(4)?

9 A. Well, I've once read the advisory  
10 notes. What were you referring to?

11 Q. I'm referring to the power of the  
12 district court under Rule 23(c)(4) to  
13 address specific issues in a class action  
14 and not address other issues. Typically  
15 under a trial management plan, individual  
16 issues are either grouped together or else  
17 they're left to be resolved by other forms.

18 A. Well, let's make a distinction  
19 here. If a judge certifies certain issues  
20 for class treatment and then, as I was  
21 talking to Mr. Bruno, there's bifurcation or  
22 through case management the other issues are  
23 then determined on an individualized basis,  
24 there's no problem about splitting the cause  
25 of action. That's all within the same



1 suit.

2 What I'm talking about is the  
3 problem of someone going through this class  
4 action to final judgment and receiving  
5 medical monitoring having -- relating to his  
6 tobacco-related injuries and receiving  
7 damages for emotional harm, and then coming  
8 and filing another lawsuit for other  
9 tobacco-related injuries. And I think  
10 there's a serious problem, as I read the res  
11 judicata law of most states.

12 It clearly falls within the  
13 transactional test. There's no problem of  
14 certifying some issues for common trial and  
15 resolving the other ones in an  
16 individualized trial within the same suit.  
17 That's not splitting the cause of action.

18 Q. Well, there's medical monitoring  
19 classes filed all the time that involve  
20 continuing and ongoing medical monitoring.  
21 If an individual is diagnosed subsequently  
22 to that case with any type of an injury,  
23 they file a lawsuit; correct?

24 A. I don't --

25 Q. You just don't know?

1           A.       I don't know how those cases have  
2       been handled.

3           Q.       If there's case law to that  
4       effect, you would agree that what you said  
5       about barring other claims might not be the  
6       case if the case law is to the contrary of  
7       that; would you not?

8           A.       Well, I'd want to look at the case  
9       law. If that issue has been definitively  
10      decided, then it's been definitively  
11      decided. By the way, definitively decided,  
12      of course, the res judicata standards are  
13      state standards. So one would have to know  
14      that it was definitively decided in all 50  
15      states.

16          Q.       I'd like to talk a little bit  
17      about Rule 23 and what your understanding of  
18      Rule 23 is. Can you tell me what Rule  
19      23(a)(1) applies to?

20          A.       If you've got the -- I'm not very  
21      good at remembering numbers.

22          Q.       Let's just talk about the  
23      certification procedures. Let's take  
24      23(b)(1)(A).

25          A.       Okay.

1 Q. Have you ever been class counsel  
2 in a case certified under 23(b)(1)(A)?

3 A. (b)(1)(A) is a mandatory class  
4 action wherein consistent standards may  
5 exist for the common -- for the party  
6 opposing the class.

7 Q. Inconsistent adjudications may  
8 result in varying standards and incompatible  
9 conduct. Have you ever been counsel in a  
10 class that was certified under that  
11 provision?

12 MR. McDERMOTT:

13 Okay. Let me interrupt here.  
14 This is not a memory test, Professor  
15 Sherman. If you want to get a copy of the  
16 rules, I'm sure we can furnish them.

17 MR. EBLE:

18 No, he's testifying as an expert.  
19 I want to see what his knowledge of the  
20 rules are. He said he's been counsel in  
21 dozens. I want to ask him what provisions  
22 he's been counsel in.

23 MR. McDERMOTT:

24 I'm not sure that expertise is  
25 very heavily dependent upon being able to

1 recite the rule verbatim. But if that's the  
2 quiz you want to pose, we'll let you  
3 continue for a little while. But we're  
4 getting kind of far afield here.

5 EXAMINATION BY MR. EBLE:

6 Q. I would like to ask you, have you  
7 ever been counsel of record in a class that  
8 was certified under (b)(1)(A)?

9 A. Several, several classes in which  
10 I've been counsel were sought  
11 certification. It's typically -- As you  
12 know, one seeks certification under as many  
13 categories of 23(b) as one can. And in a  
14 number of cases, we've raised claims under  
15 23(b)(1)(A) for certification. And I think,  
16 yes, I think they were certified.

17 The case in which I was -- I  
18 testified on the class certification  
19 question, the Carter Wind Tunnels case, was  
20 certified as a mandatory class action under  
21 (b)(1)(A) as well as under (b)(2).

22 Q. Your testimony is you were counsel  
23 in that case and you testified in that case,  
24 also?

25 A. No, no, my testimony is that the

1 case in which I gave expert testimony on the  
2 class certification issue dealt with (b) --  
3 with the certification under (b)(1)(A) as  
4 well as certification under (b)(2), and was  
5 certified under (b)(1)(A).

6 Q. What does provision (b)(1)(B)  
7 relate to?

8 A. (b)(1)(A) relates to inconsistent  
9 standards that would affect the party that's  
10 opposing the class. And the typical  
11 (b)(1)(A) situation is where the class is  
12 suing, for example, the corporation -- a  
13 group of bond holders is suing the  
14 corporation. And if there were  
15 individuals -- if there were individual  
16 suits, differing judgments might impose  
17 differing duties on the corporation  
18 regarding the bond holders.

19 (b)(1)(B) focuses not on the  
20 class -- on the effect of imposing the class  
21 but on the other class members, if you do  
22 not utilize the class action device. And  
23 the most -- The Paradigm example is the  
24 limited fund situation in which if  
25 individual litigation takes place, one or

1 two or early litigants might exhaust the  
2 fund and leave nothing left for the other  
3 class members.

4 Q. Have you ever been counsel of  
5 record in a (b)(1)(B) class?

6 A. I have in a (b)(1)(B) class.  
7 We've also sought certification under  
8 (b)(1)(B) as well.

9 Q. Can you tell me the name of the  
10 case?

11 A. I can't tell you -- I can't tell  
12 you offhand.

13 Q. You talked in terms of fraud as  
14 being an individual claim. Fraudulent  
15 concealment, if fraudulent concealment  
16 occurs in a case, that would be a pattern of  
17 conduct that would apply class-wide; would  
18 it not?

19 A. Are you talking now about the  
20 statute of limitations question?

21 Q. No, I'm talking in terms of what  
22 we call typicality or commonality of  
23 claims. If you have, for instance,  
24 fraudulent concealment by virtue of the  
25 term, that means information was not

1 conveyed to other people.

2 A. Well, I think of that term in  
3 reference to the running of the statute of  
4 limitations. Are you talking about it in  
5 reference to some other substantive cause of  
6 action?

7 Q. Correct. Have you ever heard of a  
8 cause of action called fraudulent  
9 concealment?

10 A. I guess there may be some states  
11 that have such a tort. It's not a -- I  
12 don't think it's a widely-recognized tort,  
13 but I suppose there are some cases. I don't  
14 know.

15 Q. Another point I'd like to question  
16 you about is are you telling the Court that  
17 if they tried this case on negligence,  
18 they'd have to convene 50 different juries?

19 A. Fifty?

20 Q. Right.

21 A. I don't know where you get that  
22 number.

23 Q. Well, when you were asked  
24 before --

25 A. Oh, based on different --

1 Q. -- about choice of laws --

2 A. Choice of laws, okay.

3 Q. -- you indicated that there would  
4 be 50 different laws that would have to  
5 apply and that it would require 50 different  
6 juries; is that correct?

7 A. Well, what we have to do is we  
8 have to go issue by issue. Each of the  
9 substantive claims will likely require the  
10 application of the laws of the 50 different  
11 states. Each of the defenses will likely  
12 require the application of the 50 different  
13 states. And damages will differ in 50  
14 different states.

15 Obviously, the Court is going to  
16 have to determine the differences as to each  
17 of these issues. There may be some cases,  
18 some states which have essentially identical  
19 laws on certain issues. And, if so, they  
20 may be able to be grouped.

21 In certain areas there's a much  
22 higher likelihood of divergence. That's  
23 particularly true of the rights of survivors  
24 and significant others and relatives and  
25 those kinds of areas, in the areas of



1 statute of limitations where there are great  
2 differences, in the areas of damages, in the  
3 area of consumer protection laws. There are  
4 some others in which groupings might be  
5 possible.

6 The fact that a lot of states have  
7 been influenced by restatement Section  
8 402(a) in strict liability may permit some  
9 grouping in the area of strict liability.  
10 So that's a judgment that's going to have to  
11 be made on the basis of a comprehensive  
12 review of the laws of the states.

13 Q. Well, classes have been certified  
14 nationally on issues of negligence; correct?

15 A. I don't -- I don't know of --  
16 There have been settlement classes that have  
17 been -- Offhand, I can't tell you about  
18 classes based on settlement, where the laws  
19 of the 50 states are going to apply.

20 Q. Well, the Wadleigh case that was  
21 certified last week involved that very  
22 issue.

23 A. Okay. Well, I'd like to see  
24 that. That's not a settlement class?

25 Q. Nope. Litigation class. Judge

1 Grady, United States District Court for the  
2 Northern District of Illinois.

3 Typically, even when you have  
4 strict liability and you have questions  
5 involving defectiveness or breach of  
6 warranty, there's no more than about four or  
7 five subclasses that would be required to  
8 cover the law of all the states. And, in  
9 fact, it's true; does that --

10 A. I'm not at all sure that that's  
11 true. I think there's some groupings; but  
12 as small as four and five would -- I'm just  
13 not sure those groupings. That  
14 number, course, would still be too large  
15 to use multiple juries or to use different  
16 interrogatories to the same jury because I  
17 think there would be quite a problem of jury  
18 confusion having to apply to five different  
19 standards.

20 Q. Have you ever heard of In Re:  
21 West Virginia Mass Asbestos Trial 3?

22 A. I don't think so.

23 Q. Well, that very same thing I'm  
24 talking about was done with the States of  
25 West Virginia, Ohio, Pennsylvania and

1 Kentucky.

2 A. What same thing was done?

3 Q. Where the multiple jurisdiction  
4 laws were tried in the same case.

5 A. Through use of multiple juries  
6 or --

7 Q. Through the use of instructions to  
8 juries.

9 A. Through instructions.

10 Q. And the cases that were similar  
11 were grouped together in the jury  
12 instruction.

13 A. I think that if you're talking  
14 about -- That was four different states?

15 Q. They tried the verdict, it went to  
16 verdict, I think on June 8th is when the  
17 verdict came back. Judge MacQueen.

18 A. That may have been done. I think  
19 that probably four is getting to the outer  
20 limits of giving jury -- conflicting jury  
21 instructions to a jury on the basis of four  
22 different laws. I can't imagine that you  
23 could do it with many more than that, but  
24 that may well be possible in the case of  
25 four.

1           Q.       You mentioned the caveat that was  
2       in the 1966 edition to the Federal Rules of  
3       Civil Procedure, Rule 23, that said mass  
4       accidents are ordinarily not suitable to  
5       class action disposition. Are you aware of  
6       the fact that Charles Allen Wright was one  
7       of the authors of the committee notes?

8           A.       Oh, yeah, I've cited Professor  
9       Wright's comment that he thought that that  
10      statement in absolute terms was not  
11      correct. We have it in our complex  
12      litigation casebook.

13          Q.       Sure.

14          A.       And I agree with him. I don't  
15      think that's -- I don't think that's a  
16      proper absolute. And I've suggested that  
17      there's a continuum and there are plenty of  
18      cases that are properly certified as class  
19      actions that are mass torts.

20          Q.       Did you cite in your affidavit  
21      that you -- Did you talk about the contrary  
22      side of the factors that might favor class  
23      action litigation in a case of this  
24      magnitude?

25          A.       Well, I haven't attempted to set

1 out all those factors. A number of those  
2 factors have been raised by the plaintiffs.  
3 And they will be before the Court. I  
4 particularly was -- It was my objective to  
5 look at it and raise the kinds of  
6 considerations that I thought a court would  
7 have to weigh.

8 Q. Are you aware of the breast  
9 implant litigation?

10 A. A little bit, yes.

11 Q. Do you know who the judge is in  
12 that?

13 A. Who is that pending before? Is  
14 that --

15 Q. It's an MDL in front of Judge  
16 Pointer.

17 A. Yeah, Judge Pointer, right.

18 Q. Are you aware that there was a  
19 national class filed for women who had  
20 breast implants and that was set up as a  
21 litigation class that would involve issues  
22 of multiple jurisdictions, the entire United  
23 States?

24 A. Well, I'm not familiar with it,  
25 with exactly how that's been dealt with.

1 But I can assure you that if he is going to  
2 attempt to do so, he's going to have some  
3 managerial problems or else he anticipates  
4 that there's going to be a settlement that  
5 will resolve those problems.

6 Q. I'd like to ask you when were you  
7 first contacted by the asbestos companies, I  
8 mean the -- Jesus, a force of habit -- when  
9 were you first contacted by the tobacco  
10 companies regarding your possible testimony  
11 in this case?

12 A. It was in early summer. I think  
13 it was June, late June. I was contacted by  
14 Mr. Klonoff.

15 Q. And who does he represent?

16 A. You know, he represents one of the  
17 tobacco companies but I can't even tell you  
18 which one. American Tobacco Company, I  
19 think.

20 Q. Had you ever been hired by a  
21 lawyer representing a tobacco company  
22 before?

23 A. No, I haven't.

24 Q. Prior to being hired by the  
25 tobacco -- Prior to being hired to testify

1 in this case, hadn't you written in the past  
2 that a class action should not be found  
3 unmanageable without exploring the  
4 procedural devices available for bringing it  
5 in line?

6 These include subclassing and  
7 trial of subclass issues separately,  
8 bifurcating liability and damages, using a  
9 fluid recovery, devising an objective  
10 formula for determining individual damages,  
11 issuing orders under Rule 23(d) to prevent  
12 undue repetition or complication in the  
13 presentation of evidence or argument, and  
14 appointing a special master for difficult  
15 evidentiary matters, use of litigation  
16 committees or surrogates to receive claims  
17 and proof of eligibility for individual  
18 damages, and trying certain issues first in  
19 anticipation of further settlement? Was  
20 that your --

\*21 A. That's right. And those are the  
22 kinds of considerations that I applied in my  
23 analysis of this case.

24 Q. Now, when you talked about the  
25 school litigation in 1992 in the published

1 article, you didn't describe that school  
2 asbestos case as a failure in your article;  
3 did you?

4 A. Well, the -- we now have five more  
5 years of experience with that. But that  
6 article indicated some of the problems that  
7 that case had. It describes one of the  
8 problems with using the class action  
9 device. There were a number of pending  
10 cases by schools that were pending, and the  
11 judge who had that case issued an anti-suit  
12 injunction prohibiting those from going  
13 forward.

14 And Judge Parker, who is someone  
15 not adverse to using class actions, refused  
16 to abide by that injunction on the grounds  
17 that he had several schools before him, that  
18 discovery had been done, they were moving  
19 towards settlement or trial, and that to  
20 pull these under the class -- under a class  
21 action rather than allowing individual  
22 litigation would be inefficient. And the  
23 judge backed down there and withdrew that  
24 anti-suit injunction.

25 So there were problems -- There



1 are lots of problems in that case, of  
2 course. My article also cites the fact that  
3 it was -- mandatory class action was  
4 reversed on appeal by the circuit court.

5 Q. Well, that particular principle  
6 just goes to the effect of commonality and  
7 the anti-injunction act on a federal court  
8 setting in a national class; doesn't it?

9 A. That was the particular issue, the  
10 federal is a problem of the anti-suit  
11 injunction. Well, federalism and also Judge  
12 Parker. It's another federal court. But  
13 the impact of trying to tie this up as a  
14 class action when individual suits were  
15 going forward to resolve those claims.

16 MR. EBLE:

17 I believe I'm just about  
18 completed. Give me another minute or two  
19 here. Let's go off the record for about a  
20 minute.

21 MR. BROWN:

22 Off the record at 5:15:06.  
23 (Off-the-record discussion.)

24 MR. EBLE:

25 Let's go back on the record.

1 MR. BROWN:

2 We're back on the record at  
3 5:16:49.

4 EXAMINATION BY MR. EBLE:

5 Q. In 1991, wasn't it your statement  
6 in a published article that "In such  
7 desperate matters as securities fraud,  
8 antitrust, civil rights, mass torts and  
9 environmental injury, many people often rely  
10 on the same basic transactions, events or  
11 conditions in seeking judicial remedies for  
12 their injuries. If they file separate  
13 suits, it is likely there will be similar  
14 discovery and trial preparation, many  
15 identical issues and much of the same  
16 evidence. If the suits could be aggregated,  
17 therefore, there might be economies of scale  
18 efficiencies through avoidance of  
19 duplication and consistency of result"? Was  
20 that your statement?

21 A. That's right. And I believe --  
22 I'm still a fan of believing that a court  
23 should seriously consider aggregative  
24 techniques in order to avoid duplicative  
25 litigation.

1           Q.       And at one point weren't you a  
2       proponent of the philosophy that there  
3       should be an ability of the Court after it  
4       seizes a national class action to enjoin  
5       other duplicative litigation that was  
6       ongoing?

7           A.       Yeah. This, of course, is a very  
8       specialized category of cases and that's,  
9       particularly, mandatory class actions. And  
10      those actions in which individual litigation  
11      would really be disruptive of the case. And  
12      I think that there are cases for allowing  
13      anti-suit injunctions.

14                 In that same article, however, I  
15      express some of the problems with anti-suit  
16      injunctions. As involved in the United case  
17      where the Court issued a mandatory class  
18      action and would not let the individual  
19      parties litigate their own distinctive  
20      claims.

21           MR. EBLE:

22                 I have no further questions.

23           MR. McDERMOTT:

24                 Any questions down the table? No  
25      questions here. That concludes the

1 deposition.

2 MR. BROWN:

3 The deposition is concluded.

4 Leaving the record at 5:19:13.

5 (Whereupon the deposition was  
6 concluded at 5:19 o'clock p.m.)

7 \* \* \* \*

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4        WITNESS' CERTIFICATE  
5  
6

7            I have read or have had the foregoing  
8        testimony read to me and hereby certify that  
9        it is a true and correct transcription of my  
10       testimony, with the exception of any  
11       attached corrections or changes.  
12

13  
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15        -----  
16        EDWARD F. SHERMAN, J.D.  
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REPORTER'S CERTIFICATE

I, CHERYL FOURNET HUFFMAN, Certified Court Reporter, do hereby certify that the above-named witness, after having been first duly sworn to testify to the truth, did testify as hereinabove set forth;

That the testimony was reported by me in shorthand and transcribed under my personal direction and supervision, and is a true and correct transcript, to the best of my ability and understanding;

That I am not of counsel, not related to counsel or the parties hereto, and not in any way interested in the outcome of this matter.

*Cheryl F. Huffman*  
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